SELECTIONS

FROM THE

Records of the Government of India.

HOME DEPARTMENT.

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No. LXXXIX.

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state of feeling about all legal matters and principles than existed here before the mutiny. This is a fact with which we have to deal, and which I do not think any rational person can seriously regret.

This change supposed to be inconsistent with executive vigor.

A very deeply-rooted prejudice, which assumes all sorts of forms, no doubt disposes people to think that this state of feeling is inconsistent with executive vigor. I believe this to be a complete mistake. Nothing can be more destructive of all executive vigor than an uneasy suspicion that the course which an officer intends to take may very probably be illegal. Nothing more conducive to it than the certainty that it is warranted by express law. It appears to me that the best possible security for executive vigor is to define precisely by express law thrown into the clearest and shortest form the amount of discretionary power to be given to judicial and executive officers, that amount being determined by general considerations of expediency. Men under those circumstances know the limits of their power, and act within it vigorously. The notion that there is an opposition in the nature of things between law and executive vigor, rests on a fundamental confusion of ideas and on traditions which are superannuated and ought to be forgotten.

Fallacy of this opinion.

How to deal with the change.

Whether, however, the change is matter of regret or congratulation it is quite impossible to doubt that it has taken place and is irrevocable, and that the best hopes both of the permanence and utility of our power, lie in a due appreciation and in a proper management of it. My own belief is that, by steadiness, patience, and firmness, it may be made the strongest of all securities for our rule; for it may, if properly used, enable us to enlist upon the side of a constituted system of law and order the most active and intelligent members of the Native population.

Its effect on the loyalty of the intelligent classes of Natives.

Hardly any feeling is stronger, or can be relied upon with more entire confidence, than the feelings with which a professional lawyer regards the system which he administers. A man distinguished from his neighbours by the fact that he has, by considerable efforts, mastered a system which gives him power and profit, and by the help of which he may expect to rise to wealth, is likely to uphold and support it, rather too much than too little. This is so in all countries; but there are reasons why this cause should operate with peculiar force in India. The solidity, precision, and eminently business-like and definite character of Anglo-Indian institutions and Anglo-Indian law, supply, as Sir H. Maine strikingly remarks in his work on Village Communities, just the element in which all merely Indian education and thought is utterly deficient: Native thought and literature, says Sir H. Maine, "is elaborately inaccurate; it is supremely and deliberately careless of all precision in magnitude, number, and time. But, to a very quick and subtle-minded people, which has hitherto been denied any food but this, mere accuracy of thought is by itself an intellectual luxury of the very highest order." The eagerness with which Native students at

the universities study law is most significant upon this head. It appears to me difficult to over-estimate the ultimate results, moral, political, and intellectual, which may be expected from this state of things when it has had, and if it has, full time to develope itself. It may give us a hold upon the intellect of the people of this country quite unlike anything which we have hitherto possessed. If any one doubts this, he should remember the influence which the study of Roman law exercised over the character of an infinitely more mixed and various set of populations than those over whom we rule, under circumstances far less favorable to the spread of education and the diffusion, maintenance, and transmission of knowledge.

Our system is in its infancy.

All this, however, is at present in its infancy. The three universities are only fourteen years old. No Native of 40 years of age can well have been educated in them. The education of the elder men of the existing generation was for the most part miserable, and we ought not, therefore, to be discouraged at some degree of clumsiness, technicality, and stiffness in working a system which is only now beginning to be appreciated and understood. Our great object ought to be to make the system at once as strict and as simple as possible, to keep it from becoming unwieldy by the means above suggested, and to allow it gradually to produce its natural results.

Its merits as compared to English law.

After speaking so freely of its defects, I may be permitted to conclude by saying a few words on its merits, for they are undoubtedly very great. In some respects it appears to me to contrast favorably with the administration of justice in England. In the first place there is hardly any nonsense at all in the system. It is a system carefully and laboriously constructed; superintended with extraordinary watchfulness and care, and worked by men who are paid for it and give their whole attention to it. It is not a heap of institutions, resting upon no principle, formed upon no system, and incapable of being understood except by a long course of historical study. It would be easy to show that many features connected with the law and administration of justice in England would be regarded as intolerable abuses in India, or in any other country which had not become used to them by degrees. The cumbrous and pompous nonsense which infests many parts of the law of England, would be seen at once in its true colors in India. An enormously rich country can afford, if it pleases, to have things done in a wasteful, extravagant, and essentially foolish manner. In a very poor country, where nearly every European is either an official or a professional man, and where every official and every professional man has to work at the very utmost stretch of his power, it is necessary to keep much closer to common sense; and, although I think that mistakes have been made in many instances, it is impossible to study Indian legislation and Indian institutions without perceiving a constant wish and a series of most pertinacious efforts to do substantial justice under circumstances of singular difficulty. Whatever may have been the defects of Indian government,

Reforms.

want of interest in the work to be done, want of vigilance in superintending the manner in which it is done, want of energy and enterprise in improving the manner of doing it, are not amongst them.

To give a single example, I may refer to works written many years ago upon our Courts and their system. In Shore's Notes on Indian Affairs, which I have already quoted, and in Bishop Heber's Journal, the date of which is considerably earlier, it is put forward as a crying grievance that witnesses were kept hanging about the Courts for long periods of time, that arrears accumulated to a grievous extent; in short, that the system of administering justice was such as to inflict upon the people at large all the evils which can be inflicted by suspense and delay.* How far analogous evils may still exist it is difficult to say, but this at least is clear: every possible precaution that can be taken against them by the most rigid system of supervision and returns is taken. These returns may be unduly cumbrous, and may add needlessly to the labor of the judicial officers. I think that this is often the case, but they afford proof of many very remarkable facts.

* Shore's Notes on Indian Affairs, I., 236-273.

Illustration from Oudh Report, 1870.

I will take a few illustrations from the Oudh Report for 1870. One of the great grievances in old times was the length of time for which witnesses were detained waiting on the Courts. It appears that, in 1870, 64,454 witnesses were examined in criminal cases in Oudh; of these, 59,185 were discharged after one day, 25 only were detained for eight days, and no one was detained for more than eight days. If this were compared with the number of witnesses detained at the Old Bailey or the Liverpool Assizes, it would give surprising results. There were heard in Oudh, in the Civil Courts, in 1870, 227,543 cases. Their average duration from the institution of the case to the appearance of the defendant was eleven days. Their average duration from the appearance of the defendant to the decision was six days. In the Criminal Courts 40,658 cases were disposed of, and their average duration was only three days. In the Courts of Session held before the Commissioners, 336 persons were tried, and the average duration of the cases was 26 days. In the Courts of the Deputy Commissioners 1,062 persons were tried for offences involving two to seven years' imprisonment. These cases lasted, on an average, eleven days.

In England the cases tried before the Courts of Session might have been disposed of in a few days, or kept undisposed of for many months, according to the time of year at which they were committed and the date at which the Assizes might be held. The cases tried by the Deputy Commissioners would probably have come before the Courts of Quarter Session, and might, in many cases, have been delayed for two months or more.

I take Oudh merely as a specimen, and I believe it to be a fair one, of the administration of justice in India. It shows how the systematic adjustment of the Courts to their work, and the fact that nearly all

the Judges are paid servants of Government who give up their whole time to their official duties, and are kept under a rigorous system of control and supervision, have produced a system which, with all its faults and all its intricacy, is infinitely more expeditious and effective than that of England.

I may, perhaps, be allowed to add that, from one cause or another, a good many records of trials have come before me officially, and I have been struck in most of them by the painstaking and generally sensible way in which the work seemed to have been done. The cases which come under the notice of the Government of India are naturally, however, rather criminal than civil.

I should say, upon the whole, that the administration of justice in India requires careful and constant supervision, and that the danger to which it is most subject is intricacy and technicality; but that, on the other hand, it is carefully and systematically constructed and superintended; that it has improved and is in the course of improvement; that it is worked with a degree of vigor, perseverance, and care, which it is difficult to over-praise; that in several important respects it contrasts most favorably with the administration of justice in England; and that, if its shortcomings are remedied in a gradual manner, but on a systematic plan, and with a definite object in view, it is almost impossible to over-estimate the moral and general effect which it will ultimately produce upon the people at large, although its advantages must always be greatly diminished by difficulties altogether inseparable from our position in India.

JAMES FITZJAMES STEPHEN.

Extract from the Proceedings of the Government of India in the Home Department (Judicial),—No. 197—208, *dated Fort William, the* 3rd *February* 1872.

READ—

A Minute by the Hon'ble J. F. Stephen on the administration of justice in British India.

RESOLUTION.—This Minute embodies Mr. Stephen's views and suggestions on a variety of important matters connected with the administration of justice in British India.

2. The Governor General in Council is not prepared to decide at once upon these suggestions, but would wish, in the first instance, to invite an expression of the opinion of the Local Governments and Administrations upon such of the proposals made by Mr. Stephen as concern them more closely.

ORDER.—Ordered, that a copy of the foregoing Minute, together with a copy of the despatch this day addressed to Her Majesty's Secretary of State, and of this resolution, be published as a "Selection from Records," and circulated to the Local Governments and Administrations named on the margin, for the purpose above indicated.

Fort St. George.	Oudh.
Bombay.	Central Provinces.
Bengal.	British Burmah.
N. W. Provinces.	Coorg.
Panjáb.	Hyderabad.

Ordered also, that a copy of these papers be forwarded to the Department of Agriculture, Revenue, and Commerce for information and record.

(True Extract.)

E. C. BAYLEY,

Secy. to the Govt. of India, Home Dept.

No. 13, dated Fort William, the 3rd February 1872.

From—The Government of India.

To—Her Majesty's Secretary of State for India.

Judicial, No. 13, dated 30th June 1871, paragraph 4.
Judicial, No. 30, dated 3rd October 1871, paragraph 2.

REFERRING to our despatches noted on the margin, we transmit herewith a copy of a Minute by our Hon'ble Colleague Mr. Stephen, which deals comprehensively with a great variety of important subjects connected with the administration of justice in British India, together with a copy of our resolution thereon.

2. The Minute, it will be understood, embodies Mr. Stephen's own views on these subjects and not the opinion of the Government. We do not at present desire to offer an opinion on the suggestions made by our Hon'ble Colleague, but we intend to publish the Minute as a volume of "Selections from Records," and to forward copies to the several Local Governments and Administrations with a view of inviting discussion on the several proposals of Mr. Stephen. The adoption of this course will no doubt bring us a number of valuable papers from officers of experience, and will inform us of the views of the Local Governments and Administrations. We shall then be in a better position to consider Mr. Stephen's suggestions and to submit to Your Grace any specific proposals that may appear to us to be called for.

~~367~~

SELECTIONS

FROM THE

Records of the Government of India,

HOME DEPARTMENT.

No. LXXXIX.

MINUTE BY THE HON'BLE J. FITZJAMES STEPHEN
ON THE ADMINISTRATION OF JUSTICE
IN BRITISH INDIA.

Published by Authority.

CALCUTTA:
Printed at the Home Secretariat Press.
1872.

PREFACE.

This Minute was originally written in the summer of 1870, upon certain papers then submitted to the Government of India by the Local Governments.

It was revised in the summer of 1871. Some of the matters to which it refers have been dealt with by legislation in the course of the winter of 1871-72; and some alterations may have occurred in the number of the Judges, &c., in the different Provinces since the Minute was written.

J. FITZJAMES STEPHEN.

April 1872.

INDEX.

CHAPTER IV.

CHAPTER V.

CHAPTER VI.

Minute by the HON'BLE MR. STEPHEN *on the administration of justice in British India.*

PROBABLY no subject connected with the Government of India has been so long or so much under consideration as the best mode of organizing our judicial establishments. The question has been discussed all over India. The Government of India issued questions to the Local Governments upon the whole subject about four years ago. Their replies, together with a great mass of papers upon the subject written by different persons of authority in the course of nearly forty years, have been collected. Practical questions, more or less connected with it, have been raised by almost all the Local Governments. Definite proposals upon the subject have been made by the Governor in Council of Madras and the Lieutenant-Governors of Bengal and the Punjab. The materials for a decision are thus as complete as they are ever likely to be. I have carefully studied these authorities, and have made such inquiries and observations as I could upon the different parts of the subject since my arrival in this country; and I now propose to consider at length the various questions which arise upon it. These questions are as follows:

(1.) What is the actual state of our judicial organization?

(2.) Is it desirable to separate judicial aud executive functions when, under the existing system, they are united?

(3.) Is it desirable to establish a special judicial branch of the existing Civil Service?

(4. Is any modification required in the existing systems of civil and criminal procedure?

(5.) What practical suggestions can be made in accordance with these principles, regard being had to economy and to the increased employment of Natives?

Each of these points is considered in a separate chapter.

CHAPTER I.

WHAT IS THE PRESENT STATE OF OUR JUDICIAL ORGANIZATION?

Regulation and Non-Regulation system.

THE answer to this question must differ according to the different Provinces of which the Empire is composed; but one broad distinction pervades the whole subject. This is the distinction between the Regulation and Non-Regulation Provinces. Before the establishment of the English

power in Bengal, there was no distinction between the judicial and executive functions. "Under Eastern despotisms," says Mill,* "the different powers of Government were seldom communicated asunder. To the power of collecting the revenue by a military force was added the power of administering justice. All civil disputes appear to have been regarded in India as falling naturally under the cognizance of the agents of revenue; and, in fact, the whole business of judicature and police, with the sole exception of inflicting the highest class of punishments, devolved upon zemindars, each within the District over which he was placed."

* Volume V., 406.

Regulation system established in 1793 in Bengal.

The preamble of the famous Judicial Regulations of 1793, by which the Zillah Courts were organized, proves that the separation of the two branches by the establishment of independent Courts of Justice was one of the principal objects then had in view. The following remarks in the preamble show the spirit in which the Legislation of 1793 was framed:

"To ensure, therefore, to the people of this country, as far as is practicable, the uninterrupted enjoyment of the inestimable benefit of good laws duly administered, Government has determined to divest itself of the power of interfering in the administration of the Laws and Regulations in the first instance, reserving only as a Court of Appeal or review the decision of certain cases in the last resort, and to lodge its judicial authority in Courts of Justice, the Judges of which shall not only be bound by the most solemn oaths to dispense the Laws and Regulations impartially, but be so circumstanced as to have no plea for not discharging their high and important trusts with diligence and uprightness. They have resolved that the authority of the Laws and Regulations so lodged in the Courts shall extend, not only to all suits between Native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Company's investment, and all other financial or commercial concerns of the public shall be amenable to the Courts for acts done in their official capacity in opposition to the Regulations; and that Government itself, in superintending these various branches of the resources of the State, may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters to be decided by the Courts of Justice according to the Regulations in the same manner as suits between individuals. To deprive the Judges of the Courts of the power of delaying or denying justice, the Governor General in Council has determined to frame the constitution of the Courts upon such principles as will enable every individual, by the mere observance of certain forms, to command at all times the exercise of the judicial power of the State thus lodged in the Courts for the redress of any injury which he may have sustained in his person or property." Establishments on the same model were founded in the Madras Presidency by Regulation II. of 1802; in the Bombay Presidency by Regulations which were consolidated by Regulation II. of 1827.

In Madras in 1802, in Bombay in 1827.

It would be tedious and useless to follow out in detail the history of the various changes in the judicial organization of the three Presidencies which have taken place since the date of these Regulations. It is enough to observe that they laid down the broad general principle of separate judicial establishments, and set a system on foot, the general outlines of which have been ever since preserved in the three Presidencies. It is, however, necessary to give a short statement of the different systems which actually prevail in the different Presidencies, as I have observed in all the papers upon the subject that the writers appear to be acquainted almost exclusively with their own Province. Moreover, I know of no book easy of reference in which a systematic account of the matter is given. It results from this statement that, though in each of the three Presidencies as well as in the Regulation Provinces of the North-West, the judicial and executive offices are, for the most part, separated, there is no such separation in the civil service itself, except to a certain extent in Bombay. In the other Provinces Judges may receive executive appointments, and executive officers may receive judicial appointments, and, in practice, they continually do so.

Statement of existing judicial organization.

The separation between the offices themselves is by no means complete even in the Regulation Provinces. Although the District Judges are occupied exclusively with judicial functions, civil and criminal, the Magistrates, who have very considerable judicial powers, have also important executive duties.

In Bengal.

The existing judicial organization of Bengal is as follows:

	Judges.
1.—High Court	12
2.—Civil and Sessions Judges	26
3.—Additional Judges	4

The functions of these officers are exclusively judicial, and include both civil and criminal jurisdiction. The Chief Justice and four of the Puisne Judges of the High Court are Barristers. Besides them there are—

	Judges.
4.—Collector-Magistrates	36
5.—Joint Magistrates	33
6.—Assistant Magistrates	103
7.—Deputy Magistrates	196

These officers have both judicial and executive functions, and their judicial functions are exclusively criminal. The Assistant Magistrates are beginners. The Deputy Magistrates, of whom 51 are Natives, are uncovenanted subordinates. The Joint Magistrates do the bulk of the preparatory and minor criminal work, and the Collector-Magistrates the bulk of that part of the executive work which is not done by the

Commissioners, whose duty is entirely executive. There are besides these—

	Judges.
8.—Subordinate Judges and Judges of Small Cause Courts ...	41
9.—Munsifs	187

The work of these officers, of whom 11 are Europeans and 175 Natives, is entirely judicial, and is also confined to civil causes.

In Bengal, therefore, the connection of judicial and executive functions is confined to the different grades of Magistrates.

A scheme for the separation of the two branches in Bengal has been submitted by the Bengal Government. Its leading feature is the proposal that the Joint Magistrates should be called Assistant Judges, and should be confined to judicial functions. The Collector-Magistrates, however, are not to be deprived of all judicial power, though they would seldom have occasion to exercise it.

In the Regulation Districts of the North-Western Provinces the organization is similar to that of Bengal. It is as follows:

	Judges.
1.—High Court (2 Barristers)	4
2.—Civil and Sessions Judges	19
3.—Magistrates	27
4.—Joint Magistrates	37
5.—Assistant Magistrates	62
6.—Deputy Magistrates	60
7.—Judges of Small Cause Courts and Subordinate Judges	20
8.—Munsifs	68

The duties of these officers are the same as in Bengal.

In Madras.

In Madras the organization is much the same as in Bengal. It is as follows:

	Judges.
1.—High Court (2 Barristers)	4
2.—Civil and Sessions Judges	21

The functions of these officers are exclusively judicial.

	Judges.
3.—Magistrates	19
4.—Joint Magistrates	12
5.—Assistants	87
6.—Deputies	49

The functions of these officers are partly judicial, partly executive, but, in so far as they are judicial, they are exclusively criminal.

	Judges.
7.—Judges of Small Cause Courts ...	11
8.—Principal Sadr Amíns	12
9.—Munsifs	110

The duties of these officers are exclusively judicial and civil. There are, besides, a Commissioner and an Assistant Commissioner at the Neilgherries, who unite the executive functions and the criminal powers of a Magistrate and Subordinate Magistrate, respectively.

In Bombay.

In Bombay the organization is somewhat different. The following is a statement of the judicial officers:

	Judges.
1.—High Court (3 Barristers)	8
2.—Judicial Commissioner	1
2.—Civil and Sessions Judges	11
3.—Assistant Judges (in three grades) ...	12
4.—Magistrates	16
5.—Assistant Magistrates	35
6.—Deputy Magistrates	24
7.—Extra Assistants	10
8.—Principal Sadr Amíns	11
9.—Munsifs	70

The classes numbered 1, 2 and 3 are exclusively judicial. Those numbered 4, 5, 6 and 7, judicial and executive, their judicial jurisdiction being exclusively criminal. Those numbered 8 and 9, exclusively judicial with civil jurisdiction. The great peculiarity of the Bombay system is, that the principle of a division between the lines of promotion, as well as between the offices themselves, has been adopted there to a certain extent. The lowest of the three grades of assistant judgeships marks the point at which the judicial and revenue lines of promotion divide. The Civilian begins as an Assistant Collector and Magistrate, and after five years' service has "to make his choice whether to remain in the revenue line, or to enter the judicial line, and his choice, once made, remains, except for special reasons, unalterable. If he enters the judicial line, he becomes an Assistant Judge, and then a Senior Assistant Judge, and it is not till after a service of seven or eight years on the Bench that he is made a Judge."

Mr. Shaw Stewart. Further papers 88.

I should observe that by "judicial" functions I mean the decision of civil and criminal cases properly so called. Much of the work connected with the collection of the revenue and the settlement department is substantially judicial, and falls to the share of the Magistrates.

Non-Regulation system as illustrated by Panjáb.

It is not necessary to describe in detail the system adopted in the Non-Regulation Provinces, as in them the union of judicial and executive functions is in full force through every grade of the service. The Commissioner in these Provinces discharges the duties of a Civil and Sessions Judge. The Deputy Commissioner is a Magistrate with full powers, and similar arrangements exist as to the inferior officers. Most of these officers have authority in civil as well as criminal cases. The following Table, constructed from the Panjáb Courts Act and the Panjáb Chief Court Act, may serve as a model—the Courts in the other Non-Regulation Provinces are organized on a similar principle:

	CRIMINAL.		CIVIL.	
	ORIGINAL.	APPELLATE.	ORIGINAL.	APPELLATE.
1. Chief Court ...	European B. S.	Highest Court of Appeal confirms sentences of death.	Extraordinary jurisdiction to remove causes from other Courts.	All Special Appeals. Superior Court of Appeal.
2. Commissioner ...	Sessions Judge.	Do.	No limitation.	Appeals from 4 & 5.
3. Depy. Commissioner	Magistrate.	Do.	No limitation.	Appeals from 5, 6, 7.
4. Assistant Commissioner, full powers	Do.	None.	Rs. 10,000	None.
5. Ditto, special powers	Such powers as Government may invest them with under Code of Criminal Procedure, Section 23.	None.	Rs. 500	None.
6. Ditto, ordinary powers ...		None.	Rs. 100	None.
7. Ditto, Tehsildar ...		None.	Rs. 300	None.

All these officers have executive as well as judicial functions. Indeed, the whole of the executive work of the Province is divided between them. The only officers in the Panjáb, whose functions are purely judicial, are the Judges of the Chief Court and the Judges of the Small Cause Courts. The only covenanted officers whose functions are

purely executive are the officers immediately attached to the Local Government, and the settlement officers. Even the Financial Commissioner has to exercise *quasi*-judicial functions in certain cases.

The organization of Oudh, the Central Provinces, and Burma, is on the same principle as that of the Panjáb. The chief difference is, that a Judicial or Chief Commissioner is substituted in these cases for a Chief Court. In the Central Provinces there are eight grades of Courts, in Burma six; but it is needless to enter into minor details.

I may, however, observe that in all the Provinces, Regulation and Non-Regulation, a greater or less number of Small Cause Courts have been established which do not form part of the District organization. The duties of the Judges of these Courts are exclusively judicial and civil.

This sketch of the judicial organization, actually existing in the different Provinces of the Empire, serves to introduce the second question which I proposed to consider, by showing its extent and the different manner in which it bears upon the arrangements of different Provinces; for it shows that, though there is no part of the Empire in which the judicial and executive departments are entirely distinct, yet it may be broadly laid down that the judicial and executive offices are divided in the Regulation Provinces and are united in the Non-Regulation Provinces and Districts.

CHAPTER II.

IS IT DESIRABLE TO SEPARATE JUDICIAL AND EXECUTIVE FUNCTIONS WHEN, UNDER THE EXISTING SYSTEM, THEY ARE UNITED?

Maintenance of non-regulation system in Non-Regulation Provinces.

I SHALL consider this question with reference to the different arrangements which prevail in the different provinces, and the first point which presents itself is, whether the non-regulation system ought to be maintained in the Non-Regulation Provinces and Districts.

Theory on which it rests how far sound.

I am of opinion that it ought not, and that the system of the Regulation Provinces is a far better one. The general principle on which the whole subject is supposed to depend is this: The regulation and non-regulation systems rest upon different theories of Government. The regulation system represents government by law, the non-regulation system represents personal government by individual force of character and personal sympathy, and acquaintance with the peculiar feelings and circumstances of the people. In a civilized town like Calcutta, it is said, you must govern by fixed rules. On the Panjáb frontier such rules are out of place; you must have a king and leader, uniting in himself all functions, executive and judicial, and

whilst responsible to his own superiors, presenting himself to the feelings and imaginations of those over whom he rules, as the "Hakim," the general representative of authority of all sorts.

I think that much confusion has been introduced into the whole subject by this way of looking at it. The government of every Province, whether regulation or non-regulation, must be and is conducted according to law, though the law by which it is conducted ought, no doubt, to be adapted to the circumstances of the country to which it applies. Many laws may, no doubt, be well adapted for Calcutta, which would be ill-adapted for the Agror Valley; but I should say that the wilder and more primitive a District might be, the greater would be the necessity for substituting a steady and regular administration of law for the individual caprice of Native rulers.

To unite *by law* all authority in one hand, to give *by law* wide individual discretion to the person in whose hands all authority is so united, to make the laws so administered as few, as plain, and as simple as possible, are, no doubt, good principles for the administration of a wild Province; but all this is government by good law as opposed to government without law on the one side, and government by bad law on the other, unless, indeed, it is asserted that laws are scientific in proportion to their intricacy and technicality, and not in proportion to their brevity and simplicity.

The best proof of this is to be found in the history of Lord Lawrence's administration of the Panjáb. Practically the Board of Administration and afterwards the Chief Commissioner had almost unlimited discretionary power, and nearly their first act was to provide what in substance were codes of laws, which in design, though not in execution, were as much superior to the regulations then in force in the North-West Provinces as the present Penal Code and Codes of Procedure are superior to the works which served the purposes of codes in the days of the Board of Administration and Lord Lawrence's Chief Commissionership. To say that in Lord Lawrence's time the Panjáb was ruled without law, is to forget the existence of the books called the Panjáb Civil and Criminal Codes and the Rules for the Administration of Civil and Criminal Justice.

The question, therefore, is between one kind of law and legal administration and another, not between government by law and government without law. The question, indeed, lies much more between different forms of administration than different forms of law. When the Panjáb Government was invested about a year ago with all but despotic power over the Agror Valley, and when it was empowered still more recently to submit rules for the government of the Trans-Indus and Peshawur Districts, it suggested not a system of arbitrary personal government but the introduction of the ordinary legal system of the country into those Districts with a very few modifications to suit their peculiar circumstances.

The question, therefore, really is, in what circumstance it is desirable, and in what circumstances it is not desirable, to unite all powers in one hand?

To this I reply it is desirable to do so, so long as nothing is attempted which a single officer cannot do; but when this point is reached, the so-called non-regulation system becomes, if persisted in, less, instead of being more, efficient than the regulation system, and, in particular, the executive functions of the officers are sacrificed to their judicial functions.

The man who was popularly supposed to be a benevolent despot becomes neither more nor less than an over-worked official burdened with a number of heterogeneous functions. I think that this is just what has happened in the Panjáb and elsewhere, though the Panjáb is probably the most favorable instance of what is inappropriately called a Non-Regulation Province. Whatever may have been the case with Lord Lawrence and his contemporaries, a District Officer of the Panjáb in the present day has just as little personal discretion in the exercise of either his executive or his judicial functions as a District Officer in Bengal or Bombay. His various duties are marked out for him by Regulations and Acts in most cases identically the same as those which prevail in the Regulation Provinces, and in all other cases as strict or stricter. Hence, to defend the Panjáb system on the ground that it leaves great discretion to the officers employed, and that a less precise and artificial system is desirable in a newly-acquired Province than is appropriate to one which has been under our rule for several generations, is to defend it on the ground that it is what notoriously it is not.

Tendency of system towards technicality and rigidity.

In point of fact whatever may have been the original principle of the system, its present tendency is towards greater technicality and rigidity and towards a very much weaker executive action than is the case in other Provinces. The cause is obvious when the matter is fairly considered. There is an obvious difference between the judicial and the executive temper. A Judge must go by strict rules. His work comes to him instead of his going to it. His duty is discharged when he has given a decision according to law, and he is unconcerned with its consequences in the particular case and with the process of carrying it into effect. An executive officer, on the other hand, must constantly look beyond rules. He must frequently have an eye rather to the particular case than the general rule. He has to take the initiative in a thousand ways and for all sorts of objects. He has to watch the execution and carrying out of his measures and their practical effect, and he is thrown into continual personal and informal intercourse with every class of the people.

System favors judicial at expense of executive functions.

Some years of such work as this may be a necessary preparation for judicial functions, but to expect one man to carry on both functions at the same time, appears to me to be unreasonable. It is not in human nature that he should not allow the one towards which he happens to be most strongly drawn to give the tone to his discharge of his duties in the other. I believe that this actually has happened in the Panjáb to a very great extent, and that the legal

element, especially amongst the younger officers, predominates over the executive. The reasons which suggest themselves as the explanation of this state of things are as follows :

Reasons—difference between executive and judicial duties—executive duties.

In the nature of the case, a good deal of discretion must be left to an executive officer, and it is by no means easy to refer to any definite test the question whether he is doing well or ill. Often, indeed, the wisdom of his measures can be tested only by time and experience. A man's immediate superiors may, and no doubt will, form an opinion of his conduct and character, but they are not called upon to express at specific times any definite opinion upon the subject, and very probably they may never have any specific occasion to do so.

Judicial duties.

With judicial work under the system in force all over India, and nowhere more energetically than in the Panjáb, all this is reversed. It is hardly an exaggeration to say that Judges have to keep an account of every hour of their time. The forms which they are required to fill up at fixed intervals show how often they sit, how many cases they have decided, and what on an average was the duration of each case. They must take with their own hands full notes of the evidence in every case which comes before them. They have in every case to give written judgments, expressing the reasons of their decisions. They must be thoroughly acquainted with the Codes of Criminal and Civil Procedure. They have superior Courts over them, which by an unexampled latitude of appeal have their judgments continually under consideration, and at the head of the whole system is placed a High* or Chief Court or other authority, by which an executive control of a most stringent kind is kept up over all their proceedings. Even in cases in which there is no appeal, the Court may, and often does, call for explanation of anything which appears unusual, and frequently administers rebukes to which the man rebuked can return no answer.

* Throughout this Minute I mean by the expression High Court to include the Chief Court of the Panjáb.

Why judicial duties get the preference.

The effect of all this is, that a District Officer, who has both executive and judicial functions to discharge, perceives that his hopes of promotion and his personal comfort alike require him to discharge his judicial duties with entire exactness and punctuality, but that no such precise test is or can be applied to his discharge of his executive functions. Hence the executive functions are neglected in favor of the judicial functions, and the practical result of the principle, which is advocated on the ground of its peculiar fitness for half-civilised and newly-acquired Provinces, is to hand over the executive government of the most important Province of the kind in the Empire to men who are under the strongest inducement to regard executive duty as of less practical importance than legal accuracy.

Practical results.

In a word, the Panjáb is governed by civilians and military officers whom their official superiors, and especially the Chief Court, are continually trying to drill into lawyers. I think this result undesirable. Its tendency seems to me to be to diminish greatly all vigour in executive administration. The Judges of the Chief Court, or the subordinate District Officers, are not to be blamed for this result. The fault lies in the ill-judged maintenance of a system, under conditions which make it work in a manner diametrically opposite to that in which it was originally intended to work. The Panjáb system is continually praised for the summary untechnical way in which its originators disposed of business. Their energy, no doubt, enabled them to get through a great deal of work ; but I may be permitted to doubt whether they would have found it possible to transact judicial business as satisfactorily as they are said to have done on the saddle, under the first tree during a halt, or in a ferry-boat, if they had been obliged to observe every rule contained in Act VIII. of 1859, and the other Acts by which it is supplemented and amended, and to be acquainted with and to obey every general order and book circular of the Chief Court, with the prospect before them of being rigidly called to account if the elaborate written record which they would have had to make of their proceedings, showed that they had failed to do so in the slightest particular.

Evils of the system.

The principal evils of the system are, I think, these :

(1.) Weakens executive.

(1.) It weakens the executive administration by practically giving the judicial administration greater prominence in the minds of the District Officers, and converting them into lawyers.

(2.) Functions clash.

(2.) The conditions under which the two kinds of work have to be done are such that it must be bad economy of time to unite them in the same person. Judicial work is in-door work, which ought to be done at stated times punctually observed ; executive work is, in many cases, out-door work, which, to be done well, must be done at all sorts of times as circumstances may require. It is obvious that a man who has to do both must either be unpunctual as a Judge, or inefficient as an executive officer. Moreover, his double character furnishes an idle man, or a man who dislikes either branch of his work, with a ready excuse for inefficiency. He can always answer any complaints made by his judicial or executive superior, as the case may be, by saying that the conduct complained of arose from an undue stress of executive or judicial work.

Opinions on subject.

I now proceed to consider the opinions of the Panjáb officers upon the subject.

Sir Donald McLeod.

The late Lieutenant-Governor thinks that "a complete separation between the judicial and administrative branches of the functions of the Civil Service in this Province" would be inexpedient, partly because "the

exercise of judicial functions is one important means out of many for obtaining that intimate acquaintance with the habits, feelings, customs, and transactions of the people which is essential for administrative excellence;" partly because "the number of cases, the decision of which involves a profound acquaintance with recondite principles of law, is insignificantly small, while the law itself is becoming daily simplified by the publication of well-digested codes." His Honor was, however, of opinion that adequate provision should be made—

(1) to prevent administrative officers being (as is at present too frequently the case) so burdened with judicial work as to neglect their executive duties, or, *vice versâ*, to neglect their judicial work for their duties as executive officers; and

(2) to provide a career for officers whose disposition, mental training, and physique, fit them to excel rather in a judicial than executive capacity.

His Honor was of opinion that this might be effected by increasing the subordinate Native agency, appointing special Assistants to certain Deputy Commissioners in Districts where judicial work is specially heavy, and additional Commissioners in like manner to assist over-worked Commissioners. I cannot say that the principle of this scheme recommends itself to my mind. It admits that the executive and judicial works, in many cases, interfere with each other. The natural remedy would appear to be rather a division of labour than a multiplication of officers. I do not see, too, how the second object, that of "providing a career" for officers specially suited for judicial work, would be attained by the scheme proposed, unless, indeed (which, I think, would, in practice, happen), it is intended that when there were two Deputy Commissioners or two Commissioners, one should take the judicial and the other the executive work. In this case there would be a division of the duties in fact; though the existing names would be retained, I think it would be better to make the distinction plainly and intelligibly both in fact and in name.

Four other Panjáb officers,—Mr. Simson, a Judge of the Chief Court, Mr. Egerton, the Financial Commissioner, Mr. Melville, the Commissioner of Rúwal Pindí, and Mr. Forsyth, the Commissioner of Jalandhar,—have given their views on this subject.

Mr. Simson.

Mr. Simson advocates for the Regulation Provinces, and specially for the North-West, a system which, in principle, resembles that actually in force in the Bombay Presidency. With regard to the Non-Regulation Provinces, he observes (without entering further into detail, or giving any reasons for his opinion)—"In the present state of the country, and according to the present state of the feelings of the people of these Provinces, I think that the happiness of the people and success of the administration are more completely secured by the unity of authority and responsibility in all departments in the hands of the head in a small District, than by the separation of office and duties which necessarily involve larger Districts with divided administration and responsibility, and a more imperfect control." He concludes, however, by saying that

he is aware that some officers complain of "a multiplicity of duties, and that their executive and administrative interfere with the proper discharge of their judicial functions." The remedy suggested for this by Mr. Simson is the appointment of additional assistants, "and the employment of some of them exclusively upon judicial work."

Pro tanto this would amount to a separation of the two branches, and, I think, there can be no doubt that this would be the practical effect of the multiplication of officers with a view to the relief of particular cases.

Mr. Egerton.

Mr. Egerton thinks (1) "that a special judicial branch of the Civil Service is not required in the Panjáb;" but (2) "that if such a separate branch be formed, it should be composed of officers who have served some time in the country." His reason for the first opinion is, that the present system "has been found to give a vigor of administration, and a directness and promptitude of control which are most beneficial to the country and to the people; and it seems impossible to entertain the question of special training for the Bench without pre-supposing that the present system of administration is to be entirely changed." His reason for the second opinion is, that a man cannot learn the Native character in Court only. "The Native in Court, and the Native out of Court, are, it may be said, distinct beings, and an officer who gained his experience of Natives from what he observed of them in Court might live for many years in India without knowing their real character. He would never, I think, be able to weigh evidence, nor to distinguish falsehood from truth, with anything like the skill which a man who had studied other phases of Native character would possess."......"He would often be unable to detect fraud, and would frequently fail to get to the heart of the matter."

The second point I postpone till I come to the question of the regulation system, as it refers to the terms on which a separate branch of the service should be organized, not to the policy of having one at all. As to the first point, I think that when Mr. Egerton spoke of vigor of administration and directness and promptitude of control, he must have had in his mind the earlier days of Panjáb administration, in which he took a distinguished part. I am led to this partly by a remark of his own, and partly by other evidence. After pointing out the simple character of Panjáb litigation, he adds:

"The excuse which is now, I believe, commonly given for the inefficient performance of judicial duties is press of work. It is no doubt difficult, in some places, for District Officers and their subordinates to distribute their time in such a way that the work of different departments shall not clash, and sometimes, no doubt, judicial work suffers from this cause. If officers were able to give undivided attention to judicial duties and brought to bear upon them the knowledge of Native character and experience they had acquired in the performance of their administrative work, there would be fewer complaints of faulty decision. If, therefore, it is determined to constitute a separate judicial branch of the Civil

Service for the Panjáb, I recommend that the members should be selected from amongst officers who have had experience in general administrative work, and have acquired a good knowledge of Native character and of the language of the country. I believe that the officers so selected, able to give undivided time and attention to the cases brought before them, would perform judicial duties with efficiency, and that the want of special judicial traning would not be left."

This amounts to an admission that the present state of things is not satisfactory, and that a separation of the two branches of the service would be a proper remedy. Indeed, the impression which all these answers leave upon my mind is, that they are given by men who like the old system and do not wish to see it changed, but who are forced to admit that it no longer works well.

Mr. Melville.

Two other Panjáb officers give answers which entirely corroborate the view put forward above. Mr. Melville observes—"I think it will be generally admitted that a distinct judicial branch of the Civil Service must be shortly formed. So much knowledge of the existing and rapidly increasing Indian legislation is required of judicial officers, and so much greater attention is necessary than formerly to the minutiæ of procedure; as time advances not only precedents have to be watched, but former cases relating to the subject have to be referred to, and that with much caution, that it is impossible for men charged with administrative functions to be efficient Judges;" and he adds—"the question of the separation of the judicial branch has now become urgent as regards the Punjab. I feel assured that the present state of things cannot last much longer."

Mr. Forsyth.

Mr. Forsyth puts the whole matter so strongly, and his remarks appear to me to bear upon them such deep marks of careful observation and antecedent probability, and they are so entirely in accordance with the information which I have received in conversation from many Panjáb officers, both in England and at Lahore, that I will extract from them largely:

"In the Non-Regulation Provinces, such as the Panjáb, officers from the commencement of their career are called upon to perform judicial duties, and here the complaint is not that they have no training for the work, but that the tendency is to subordinate all other duties to that of the Judicial Department.

"I propose to confine my remarks, then, to the Panjáb, and shall endeavour to show how necessary it is to alter the present system. I consider that, under existing arrangements, both the administrative and the judicial departments suffer by the work of both being thrown on the hands of one and the same officer.

"The accompanying Statistical Table* will show the amount of judicial work performed by the officers of this division, in all three departments,—civil, revenue, and criminal.

* This Table is not printed in the "further papers," &c.

"In addition to all this, every officer is expected to move about from time to time in his District or Sub-Division to inspect villages, watch conservancy improvements, test alluvion and diluvion statements, examine patwáris' papers, see to roads, &c., &c. The necessity for mixing with the people and becoming accessible and popular is constantly impressed upon officers, and is too apparent to require much argument. But all this is quite incompatible with the requirements of the judicial department, which demands that every case shall be enquired into with due regard to form, and in accordance with precedents and sound principles of law.

"Now, in the early days of the non-regulation system, when a rough kind of justice was accepted as sufficient for the requirements of people, it was easy for an officer to ride round his District and dispose of cases whilst crossing in a ferry-boat, or when he had a spare moment to dictate an order. Suitors sometimes tried to keep pace with the Deputy Commissioner in his wanderings, but their presence or absence had little to do with the announcement of the decision. A few words would suffice to dispose of the most important case, and, as often as not, the mere order for a decree or dismissal of the suit would be given by the Judge who left all the reasons to be filled in by the Sarishtadár. Now-a-days, however, the whole system is changed. We have a very elaborate Code of Procedure, with which the Chief Court demands implicit compliance. Dates and places have to be fixed for the hearing of cases, and forms have been multiplied, which have to be adhered to, ere a case can be brought up for judgment. Then the Judge has to quote law and cite precedents, and must write the judgment with his own hand. All this compels the Judge to wish to be stationary; and as monthly returns of work done and of delays in the despatch of judicial business are carefully inspected and commented on by the Chief Court, the utmost pressure is put upon officers to give the lion's share of their attention to the judicial department.

"The executive department cannot be so strictly scrutinised, and the consequence is, what is now notorious, that our officers pay much more attention to their Courts than they do to the out-door portion of their duties, and the result is exceedingly injurious to the interests of the people and of the Government.

"But can it be said that, though the administration may suffer, at all events the judicial service is properly performed. By no means so.

"Let any officer of experience be asked whether he can dispose of his civil work satisfactorily under the present system, and he will assuredly reply in the negative.

"The returns show that I disposed of more appeals than any other Commissioner in 1866, and yet I have the unpleasant knowledge that the quality of the work done by me was vastly inferior to that which I might have done had I had leisure to consult law books and examine all the decisions of the Chief and High Courts for precedents to guide me. I have lately been called upon to perform the duties of Additional Financial Commissioner—a purely judicial appointment—and

there I became fully aware of the evil of the double system. Officers who have of late been appointed to be Additional Commissioners for judicial purposes have made the same remark. Under the present system, then, both departments suffer, and it is for the interests of both that some change should be made.

"It may be said that the desired object may be obtained by increasing the number of officers rather than by separating their duties, and it is urged that the separation now suggested would entirely break up the Panjáb system, which is acknowledged to have worked so well.

"It is said, with truth too, that a complete knowledge of the revenue system is essential to the efficient discharge of an Indian Judge's duties. There is much force in the arguments used by the supporters of the present system; and if we could return to the days of the Board of Administration, and had the men who, having the opportunity, left the stamp of their individual character on the administration, we might desire to leave things as they were. But the whole system in the Panjáb has, in truth, undergone an entire change, and there is comparatively little scope left for the display of such individual action as was the case formerly. In all but the name we are as much a Regulation Province as the North-Western Provinces or Bengal, and any officer who now attempted to do the acts which rendered a Nicholson or Edwardes famous would find himself, perhaps, the object of a legal prosecution. The action brought against the Deputy Commissioner, Amritsar, last year shows how little room there is left for the exercise of anything approaching to despotic action on the part of a Government officer.

"So that, in truth, when men argue in favor of the Panjáb system, they are arguing for what no longer exists."

Conclusion that system should be abolished.

Upon these grounds it appears to me that in the Panjáb, in the Central Provinces, and in all parts of the country in which the Panjáb system exists, it should be abolished.

Exceptions.

I do not mean to deny that there may be parts of India in which the union of all powers in one hand may be advisable, partly because a primitive people like a single ruler, and partly because the whole amount of work to be done is so inconsiderable that it would be wasteful to employ more than a single officer upon it. Such cases should be dealt with exceptionally; but I think that, as a general rule, the complete amalgamation through every grade of the service of judicial and executive functions is inconsistent with the proper administration of a regular system of law, and especially of the Codes of Civil and Criminal Procedure.

It may be asked whether the Codes cannot be simplified? This question is considered below; but in reference to the particular point just considered, I may observe that the principal difference between the old system of administering justice and the present one appears to have been that, under the present Codes of Procedure, the Judge hears what the witnesses have to say and takes a note of their evidence. Under the old system the evidence was taken by uneducated Mohurrirs, and read over to the Judge, whose judgment was afterwards written by the Sarishtadár. The Judge thus tried, after a fashion, perhaps five or six cases at once; but it seems to me that such a system was not simple substantial justice unfettered by forms, but a mere imitation of justice in which the correctness of the judgment must have been very much a matter of chance. Justice may be rough; but I do not understand how it can possibly be substantial if the Judge does not hear the witnesses. Roughness is quite consistent with flimsiness, and I have much reason to believe that, though the old Panjáb system was an immense improvement on anything the people had known before, it neither would nor ought to satisfy them now.

CHAPTER III.

Is it desirable to establish a distinct branch of the judicial service in the Regulation Provinces?

Division of subject.

This question divides itself into three parts,—

(1) Ought the separation between the judicial and executive offices to be absolute in all cases?

(2) Ought promotion to be confined to one or the other line after a certain period?

(3) Ought any special training to be provided for those officers who might choose the judicial branch?

The extent of the first of these three questions is defined by the sketch given at the beginning of this Minute of the judicial organization of the Regulation Provinces. It shows that, as far as the separation of offices is concerned, the real question is, whether the Magistrates in their various grades ought to continue to unite criminal and revenue jurisdiction with executive functions? The Sessions Judges at the top, and the Small Cause Court Judges, Subordinate Judges, Principal Sadr Amíns and Munsifs at the bottom, of the scale, are exclusively judicial officers. Hence the combination of criminal jurisdiction with executive authority in the hands of the Magistrates is the only question really in issue.

Discussion of question 1 in Bengal in 1865-66.

The question has been discussed in each Province with a view to its special circumstances. I will notice each.

It has been discussed in Bengal on various occasions. I need not go back further at present than the year 1864.

In that year the High Court of Calcutta complained, and in 1865 it repeated its complaint, that the Chief Magistrates of the Districts did very little criminal work, the effect of which upon the administration of criminal justice the High Court regarded as injurious, inasmuch as it precluded the Magistrates from obtaining, or at least keeping up, the legal knowledge which they would require in their next step of promotion, *viz.*, to the Sessions Bench. The Magistrates were called upon for explanations and practical suggestions, in answer to which they unanimously justified their conduct, on the ground that their executive duties occupied them so fully that they were unable to undertake more original criminal business than they had actually undertaken. One gentleman in particular—Lord Ulick Browne—pointed out that, whereas the High Court had drawn a contrast between the conduct of the Magistrates of Howrah and Nuddea to the disadvantage of the latter, he had himself filled one post for one part of the year and the other for the rest, so that he received, as Mr. Chapman observed, "both the approval and disapproval of the High Court." The following are specimens of their opinions as to the course which Government should take. Mr. Jenkins says—"I am satisfied that nothing short of separating the criminal and judicial work from the Revenue and General Administration Department and appointing an officer at the head of each in almost all, if not all, the Districts of Bengal, will meet the end in view." Mr. Craster says—"The only way by which the inconvenience and clashing of duties complained of, not now for the first time, can be completely avoided, is to separate the judicial from the executive branch of the service," and he gives a plan for the purpose. Mr. Montresor says—"There cannot, I think, be two opinions that under the existing system and constitution of the united offices of Magistrate and Collector, the officer holding both offices cannot, except by a most unusual effort, do justice to the Judicial Departments under him." He adds, I think very justly—"I believe, and my experience confirms my remarks, that no officer can properly perform judicial duties, unless he is perfectly secure against interruption. To take and record evidence and conduct a trial to a sound conclusion demands complete concentration of the attention, unbounded patience, and complete security from interruption, which cannot be expected by the Collector-Magistrate much, or I might say wholly, as they may be considered essential to justice and decorum. When once in office, the Magistrate is never safe: some one has invariably some object connected with his multifarious duties that must be attended to, and the Magistrate, seeing and knowing this, cannot allow the whole executive machinery of his District to come to a stand-still." Mr. W. G. Young says—"The state of things complained of by the High Court is notoriously owing to the multiplicity of duties and departments of administrations for which a Collector-Magistrate is now-a-days held responsible, the result of which is that none of them can be carried on with thorough efficiency." Mr. Chapman (the present Financial Secretary) discusses the subject at considerable length, dwells on the practical difficulties which must attend every suggestion, and points out some circumstances tending to mitigate the evils complained of; but he admits that, if the

judicial and executive functions could be separated, if we could afford "complete separate judicial and executive staffs with areas no larger than the existing or designed areas" ...... "it would be a very desirable improvement, a very valuable administrative luxury." Lord Ulick Browne says—"I am convinced that the only remedy that will really be effective, and what we must come to in time, is the separation of the executive and judicial branches of the service, as is done in Madras." Several of these officers raise questions of great importance as to procedure and in particular as to the necessity of trying a man twice over,—once before the committing Magistrate and once before the Sessions Judge. Sir William Grey, in a remarkable passage, puts this very pointedly. "The Native community," he remarks, "never can understand why, when the *Hakim* has caught a thief, he should not forthwith try and punish him." This is a question which I shall consider when I come to make recommendations upon the subject of procedure.

Further discussion in 1868.

Nothing appears to have been done in consequence of these replies till May 1868, when the Secretary to the Bengal Government circulated, amongst various officers in the Province, a letter asking their opinion upon the question whether a separate judicial service should be established. Nearly every officer whose opinion was asked was in favor of the change. Indeed, two* only, who gave their opinions in a very summary way, were opposed to it. It would be wearisome to go through all the papers, but I may observe that Mr. Rivers Thompson, Mr. Money, Mr. Cockerell, Lord Ulick Browne, Mr. Monro, and Mr. H. Bell, all gave unqualified opinions in favor of the separation. The points taken by them were those to which I have already referred, and, in addition, they insisted strongly upon the contrast between the legal knowledge of the Native Pleaders and Judges who have received a regular legal education at the Calcutta University and the unsatisfactory training of the Civilian Judges. Thus Mr. Bell says—"I think the judicial branch of the service wants strengthening, because in the Districts near Calcutta, the Native Bar has so greatly improved that, unless a Judge has devoted some time to legal studies, he is not capable of holding his ground against the advocates that surround him. This is a very serious and not a very creditable state of things." So Mr. Cockerell observes—"We seem to be in danger of arriving at a state of things which must be prejudicial to the respect which the administration of justice in our Civil and Criminal Courts should command, *viz.*, the spectacle of a Mofussil Bar in advance of the Bench in experience of the requirements of the law, and a practical knowledge and understanding of the application of its principles." He adds—"Whilst the class from which the Judges of the principal Courts are taken have even less opportunity than formerly of acquiring experience of judicial duties, and practical knowledge of the application of the law in judicial proceedings, the officers who preside over the subordinate Civil Courts are, as a general rule, very much in advance of their predecessors in the knowledge of law and intelligence and discrimination

* Mr. Westland and Mr. C. H. Campbell.

in the application of its principles, which they bring to bear on the adjudication of suits. And now that the position and prospects of the subordinate judicial service are much improved and its members are recruited almost exclusively from the class who have attained some proficiency in the study of law, this superiority is likely to become more and more noticeable."

As to the training of the Civilians who, in time, become Sessions and Civil Judges, Mr. Monro makes the following remarks: "There can be little doubt that the present training of our officers, both executively and judicially considered, is most imperfect and defective. It consists of a system of learning and unlearning which has an injurious effect on both branches of the service. An Assistant, after passing an examination in civil law at Home, comes out to India, and, on his being posted to a District, finds that he has no chance of making any use of his knowledge of civil law until he becomes a Judge after 15 years' service. He then begins to undergo a course of executive training, which lasts for a year or two. This period passed, he finds himself at a sub-division, and expected to exercise both judicial powers and perform executive duties. His next step of promotion is to that of Joint Magistrate of a District, where he at once becomes a purely judicial officer, his executive knowledge being kept latent and held in reserve till his advancement to the charge of a District, when the executive experience of the sub-division is called into play again, and the Magistrate and Collector is expected to control, executively, a large tract of country both as an executive and a fiscal officer, and at the same time fit himself, by practice in criminal trials and revenue appeals, for an efficient performance of the functions of a Judge."

Result of evidence of Bengal officers.

This evidence, I think, sufficiently displays the objections to the state of things actually existing in Bengal, and establishes three propositions,—

(1) that the Magistrates are greatly embarrassed by the union in their persons of judicial and executive functions;

(2) that the earlier stages of judicial employment do not fit men for appointments as Sessions and Civil Judges;

(3) that there is some danger that the regular legal education now given to subordinate Native Judges and Pleaders may cause their efficiency to contrast unfavorably with the inefficiency of the European Sessions Judges.

Evidence of Madras officers.

The replies received from Madras bear upon somewhat different questions from those of the Bengal officials. None of the writers discuss the question whether the Magistrates ought to have both judicial and executive powers. They address themselves rather to the question whether it would be desirable that the Sessions Judges should serve in any and what subordinate judicial capacity before their appointment to the zila bench. Their suggestions upon this subject are, that Courts

should be established subordinate to those of the District Judges; that these Courts should combine in themselves the powers of the present Courts of the Principal Sadr Amín and the Small Cause Courts, and that the road to promotion to the zila bench should lie through these subordinate Courts.

In this view Lord Napier and Mr. Arbuthnot agree, though they differ as to the manner in which the plan should be carried out. Mr. Phillips is not dissatisfied with the existing state of things. The principal subject with which the writers are occupied is the education and training which the Judges ought to receive. Several passages in these papers appear to me to deserve particular notice, as they throw light on several branches of the general question. Mr. Arbuthnot gives the following account of the course of promotion and actual condition of things in that Presidency: "Of the twenty-one officers at this present time* presiding over the Civil and Session Courts of this Presidency, six had not held any judicial appointment before entering upon the duties of Civil and Sessions Judge, and only four had been promoted direct from the post of Head Assistant to a subordinate judicial office, and had thenceforth remained in the judicial department. The remaining eleven were either promoted from Head Assistant to Sub-Collector and Joint Magistrate, and rose from the latter office to that of Subordinate Judge or Judge of a Court of Small Causes, or had been removed backwards and forwards from the latter office to a Sub-Collectorate before being appointed to the post of Civil and Sessions Judge."

* 28th May 1869.

Mr. Phillips and Mr. Bird give evidence as to the practical working of the system which is remarkable on account of its contradictory nature. Mr. Phillips vindicates the existing Zila Judges, and says—"I do not expect professional men to agree with me in the above view, but I am sensible that the shortcomings of a technical character which they may be able to indicate in the proceedings of a Civilian Judge will be rated by them far differently than by the Native inhabitants of the country, whose litigation the Civilian Judge may be investigating and deciding. The people of this country generally have, as I conscientiously believe, been satisfied with the good and substantial justice meted out to them by the untechnical and unprofessional, but intelligent, honest, and pains-taking knowledge of our Judges, such as they are. I do not think there has been any union or sympathy on the part of the people in the cry for English law." Mr. Bird observes—"I think it cannot admit of doubt or question that it is highly expedient that a distinct judicial branch of the Civil Service should be formed without delay. The total absence of all the needful means by which training for their duties could be secured by members of the service who have hitherto been appointed Judges in the Civil and Sessions Courts has, in the great majority of cases, operated very disadvantageously to the people, and very discreditably both to the body of officers from whom the Judges have been selected and to the Government who nominated them, nor is this matter for surprise. While the service is in its present state, and no means whatever exist for educating officers for the exceedingly important duties

devolving on them as Judges of the Zila Courts, the Government is practically unable to ascertain the qualifications of candidates for this office, and the appointments have been bestowed, it is presumed, in many instances, with reference to seniority in the service alone.

"The results of course are very unsatisfactory. Some Judges, to my own knowledge, have, prior to their appointment, never sat on a judicial bench at all; others have been called, after a lengthened absence in England, with their entire previous experience in the revenue department, without the smallest preparation or training, without also acquaintance with even the rudiments of legal knowledge, to preside in a Civil Court of first class difficulty, where none but a trained and experienced Judge would succeed. Such a system as this must end in failure, and the wonder is, not that Civil and Sessions Judges in this Presidency have often made many and serious mistakes, which naturally in these days obtain world-wide celebrity, but that any single suit or trial has been properly conducted."

Lastly, I may remark that Lord Napier assumes, as a fundamental principle of his whole scheme, "that it is not intended to fill the office of Civil and Sessions Judge in this Presidency from the legal profession in England or from the Bar in India, but that the Civil and Sessions Judges are to be taken from the ranks of the Civil Service with, it may be, some rare exceptions in favor of Natives of conspicuous ability and merit."

Evidence of Bombay officers.

I need not enter at any considerable length upon the consideration of the replies received from the Bombay Presidency. They present singularly little difference of opinion. All the writers without exception appear to be well satisfied with the general principle of the system established in that Presidency, though some of them suggest improvements in detail. They all regard some years of executive and revenue work as an indispensable preliminary to judicial work. They all consider the arrangement, by which officers who are to be promoted to the position of Sessions Judges serve for some years, in the first instance, as Assistant Judges, as a good one, and as providing quite as much judicial training for the Sessions Judges as is advisable. This is the characteristic feature of the Bombay system. The Bombay Government reply to the questions of the Government of India by saying that—"in the Bombay Presidency the system is one of permanent separation, not only between judicial and administrative functions, but also between the persons by whom they are respectively performed. The system is not partial and experimental as the Government of India would appear to suppose from paragraph 3 of your letter under reply, but it has existed for many years. It was designed in the Bombay Regulations of 1827," and they add that, with occasional exceptions, it has been adhered to.

Though, however, the Bombay officers appear to be satisfied with the arrangement of the offices in that Presidency, observations are made in their answers, from which it appears that the state of the judicial branch is not altogether satisfactory even in Bombay. For instance,

Mr. Birdwood says—"I think the Bombay plan of allowing Junior Civilians their choice as regards judicial employment a good one. A sedentary life offers fewer attractions to most men than a life in the Districts. The duties of a Judge are more monotonous and wearisome than those of a Collector and Magistrate, and it would be most irksome to any young officer to be forced to do judicial work against his natural inclination. The Judicial Department has never been popular; and if any junior civilian deliberately chooses it, he may be presumed to have some special fitness for judicial work." Mr. Justice Gibbs observes—"In order to induce young Civilians to choose the Judicial Department which does not afford the active life, the constant change of scene, the chance of sport, and the other causes which render a jungle life so fascinating to many young men, there must be pecuniary charms held out which will counterbalance the pleasures of the revenue line." Mr. Justice Warden says—"The salary of Assistant Judge must be greatly increased. The present salary of Rupees 700 is not sufficient attraction, nor that of Rupees 800, which is proposed on the new scale. Men of talent are aware that they can in the revenue branch and in some of the special appointments command much higher pay. Besides the smallness of the salary, there is another thing which has tended to deter men from entering it; it has been the habit for years past to call it the invalid department, and the refuge for 'the unfit,' in other words, 'the incompetent.' It is well known that the judicial branch does not command the respect that it ought, and I am sorry to say that no attempt is made to raise it in the eyes of the public, the good men of the service no encouragement to enter it."

Other evidence is given which confirms this account of the estimation in which this branch of the service is held, though somewhat different reasons are assigned for it. I think, however, that the weight of the testimony of the two Judges of the High Court of Bombay is such as to render further evidence needless.

Evidence of officers of North-West Provinces.

I pass now to the answers received from the North-West Provinces. There is a considerable difference of opinion amongst these officers, though they agree upon various points. I will try to show where they agree and where they differ.

In the first place they agree that the present state of things is unsatisfactory. Mr. Ricketts, I think, gives the most lively and graphic account of the multifarious character of the duties which constitute the chief difficulty of the present system. It is too long to extract in full, but the following is an abstract of his account of the duties now thrown upon Magistrates and Collectors:

Magistrate's duties.

A Magistrate is general executive administrator over a District comprising from 2,500 to 6,000 square miles, with a population of 600,000 to 1,400,000 souls. He will have to supervise 40 police stations and 500

police under an English officer. He and his Assistants* will have to try 2,000 criminal cases and examine 10,000 witnesses annually. He is probably, too, a Justice of the Peace with jurisdiction over Europeans. He protects the interests of the public in all railway matters. He is Health Officer. He superintends vaccination. He is a member of the Military Cantonment Committee. He manages Lock Hospitals. "In the station and city, the Magistrate is the person responsible for the drainage conservancy, and all sanitary measures. He is the Local Board of Works and the Local Engineer." He is the active member of the Municipal Board, if there is one. He supervises (under the Civil Surgeon) all civil and charitable hospitals and dispensaries. He is the visitor of the Jail. He has the superintendence of all roads, of which, on an average, there are 500 miles in a District, and for all these, he is Executive Engineer. He has charge of tolls, ferries, shrines, and Native fairs. This may mean laying out the "camp for from 100,000 to 500,000 people from all parts of India and every sanitary arrangement for them, and the protection of their lives and property through the police." These duties, Mr. Ricketts observes, press so much on a Magistrate's time that he generally delegates the judicial work to subordinates.

* Three or four Assistants, eight or nine Native Sub-Collectors, and subordinate Native staff of 250.

Collector's duties.

The Collector's duties are as follows: Having the superintendence over the whole land revenue under the Regulations II. of 1793 and XXV. of 1803; he has to perform a large number of judicial duties. He has to decide rent cases, settlement cases, and revenue cases, in all of which he acts as a Civil Judge, according to the Code of Civil Procedure. But, besides this, he is "Superintendent of Excise and a responsible Treasury Officer." He assists when canals or other public works are projected. (I may add that many duties are cast upon him under the Land Acquisition Act, 1870.) He has to supply military carriage when required, and to act as a sort of commissariat officer. He is often Government Timber Agent, and the killer of wild beasts in the jungles. He furnishes all statistics. He manages local taxation. He takes the periodical census. He is the guardian of minors having landed estates. He has to look to serais, wells, rest-houses, and halting-places. He has to furnish information upon every sort of subject on which the Government ask for it. "He has to keep his doors open to all comers, or he is a mere office-hand disposing of his case work only."......"His personal influence is everything. He educates, leads, or drives his people according as their nature requires. If he cannot do all this, he is a cypher when the time of trial come." He, on emergency, such as famine or rebellion, has to be the general adviser as to all measures, civil or military, and must, in order to advise efficiently, possess the most minute local knowledge about every part of his District. Besides all this, "in the Panjáb and other Non-Regulation Provinces, the District Officer is all that I have attempted to describe, and much more besides. He has largely increased powers as a criminal Judge; he is the sole Civil Judge

of his District." This list of duties sounds formidable, but I doubt whether they are really so laborious as they appear when enumerated. The military duties, for instance, can arise only at intervals. The census has to be taken only about once in ten years. The "assistance" where canals, &c., are to be made, can hardly be very laborious, and the laborious part of the revenue duties must be discharged by subordinates.

Be this how it may, it is singular that, after enumerating all these duties, Mr. Ricketts should suggest the introduction of the Panjáb system into the North-West, and the sub-division of the existing Districts into smaller ones, as the best remedy for the evils which he allows to exist there, and which he attributes entirely to the fact that the staff is under-handed. It is fair to him, however, to quote the reasons which he gives for this opinion: "In the North-Western Provinces there has been hardly any change in the District divisions for 40 years. The enormous division of Goruckpore has been divided, and one or two independent sub-divisions of Districts have been made for the convenience of the inhabitants of remote parts. There has been no appreciable addition to the strength of the service. Let it be conceded that the strength of each rank and the duties assigned to each were suited to the wants of those times, can it be possible that they can suit the exigencies of the present? Reform has penetrated everywhere, every department has been re-organized. There is more centralization, more law, and far more governing. I state, as a fact, that the duties of all officers in all departments have been doubled, in many they have been trebled, endless new duties have been added, but the machinery remains the same."

Opinions of officers as to separation of duties.

There should be an executive apprenticeship.

Besides their agreement in condemning the present system, there is a substantial agreement amongst these officers in the opinion that any separation which is made between the two branches should be so arranged that the young Civilian may begin his career by several years' experience of the executive department before he is obliged to make his choice between the executive and judicial branches.

The North-West Government say—"It is admitted on all hands that the experience gained in the executive charge of a District is the best possible preparation in a general point of view for the Bench."

Mr. Simpson says—"While, therefore, I am of opinion that on the whole it would be expedient to form a distinct judicial branch of the Civil Service, I would cause very officer to serve an apprenticeship in the administrative branch, and would not call upon him to elect between the two until he had been at least seven years at work."

Mr. Dashwood wishes to see "a class of appointments in which a Civilian, who, after six or eight years' service in the grades of Assistant and Joint Magistrate, evinces an aptitude and a preference for Judicial service, should be set to work to try original suits to a certain amount and hear appeals from Munsif's decisions."

Mr. Lind says—"I would not, therefore, advise a division of the service below the grade of Joint Magistrate."

Mr. Colvin observes—"The necessity for a separate judicial branch being admitted, it remains to be seen how the scheme can be carried out. No man, I think, should be drafted into such a branch until he has served seven years in the ordinary line."

Mr. Forbes says—"If, therefore, officers are permitted at an early stage of their service to elect their future career and train themselves solely as lawyers to the neglect of the ordinary duties of a District Officer, I think the proposed separation of the two branches of the service would be injurious to the last degree; but if when they have reached that point in their career when they may be hoping for promotion to the post of Collector, they are selected for their known fitness for the judicial branch, I think the Bench would gain."

Mr. Justice Spankie suggests an apprenticeship of seven years. Mr. Roberts one of ten years. Mr. Eliott one of seven years.

Objections of certain officers to division of two branches.

I come now to the officers who oppose any further division of the two branches, and suggest that, if such a division must be made, it should at all events be put off to as late a period as possible in the officer's career. The officers who take this view are Mr. Mayne, Mr. Currie, Mr. Court, Mr. Thornhill, Mr. Justice Pearson, Mr. Batten, and Mr. Carmichael.

The grounds upon which they rest their opinion are substantially the same, and are these:

Present system gives sufficient judicial training.

(1.) They contend that the present system gives all needful judicial training to the Civilians, inasmuch as throughout their career they have to try settlement and revenue cases according to the Code of Civil Procedure. This point, insisted on, more or less, by most of them, appears to me to be put most strongly by Mr. Batten. After referring to the non-regulation system, he observes that in the Regulation Provinces and the North-Western Provinces "the administrative officers are to a great extent employed in exercising judicial functions from the earliest period of their service. As Magistrates, they are daily practised in judicial investigations and cannot fail to obtain a complete knowledge of the Criminal Law and of the Courts of Criminal Jurisdiction; as revenue officers, they are entrusted with judicial powers in all suits which arise from the relations of a landlord and tenant of land, and thus they acquire a practical knowledge of this branch of the civil law. To a great extent, the precedure of the Revenue Courts in trying these suits is the same as that of the Civil Courts.

"In what respect, then, is the training of these officers deficient in preparing them for the judicial Bench? It is in respect of the acquisition of a knowledge of the civil law in all its branches, excepting that above alluded to of landlord and tenant. It is, however, hardly possible that an officer who has administered a District,—and it is from these officers that Judges are chosen,—can have failed to acquire a considerable acquaintance with the civil law, so far as it relates to proprietary and other rights in land to inheritance, &c.; in short, the law of real property. It is chiefly in commercial law or the law of debtor and creditor that the newly-made Judge finds himself at a loss."

Division of functions would diminish influence of officers.

(2.) Many of these officers ground their objection to any further division of the two branches, more or less upon the ground that, such a step would diminish the personal influence and authority of the District Officers and lessen their intercourse with the Natives. These are familiar topics, but I think it fair to those who dwell upon them to extract here some of the most vigorous observations which they make upon them.

Mr. Court says—

"If an entirely separate branch in the service is made for the administration of duties of the Bench, an entire separation will be necessary of judicial duties. I do not think the separation of a judicial branch of the service can be entire unless the separation of duty is also entire. If this is adopted, the administrative officer will have no power to punish *auctoritate sua* for offences; the people will come to him in vain for adjudication of disputes, or for redress of grievances, and the functions of the administrative officer will comprise little more than those of a Superintendent of Police and the fiscal duties of a Tahsíldár.

"To the people I have no hesitation in saying such a change will be exceedingly unpopular. By the habit of ages, they are accustomed to look up to the administrative officer for everything. In these Provinces they dislike, though they have learnt to look to one department for adjudication of civil questions, to another for redress from violence, oppression, and fraud; but they dislike the system, and are frequently unable to distinguish between grounds for criminal prosecution and those for civil action; and so far from separating the judicial from ordinary administrative functions, I am of sincere opinion they would infinitely prefer the union of all judicial work with the administrative power, as in the Panjáb and other Non-Regulation Provinces."

* * * * * *

"I think the great defect of the competition Civilians is, that they pay too much regard to these duties in office. They are generally men of ability, and of close application. They get through their office work with care and industry, and devote their leisure hours to study of laws and languages; but they have no knowledge of the people, of their social habits or feelings. They do not go amongst the Natives in their village homes, rarely see them anywhere except in their court-room or office, and there is a want of any sympathy or feeling between them and the natives of the country. I record this opinion, not only from personal observation, but from observations made to me by Natives of all ranks and religions. I think the formation of a distinct judicial branch,

which must comprise a large majority of the service, will tend to increase, not ameliorate, this growing evil. I consider it would be a move in the wrong direction, and that it would be far better to adopt the non-regulation system, which gives to each officer according to his position, rank, and ability, judicial functions in every branch of the law, as well as administrative duties in his pargana, district, or division."

Mr. Mayne says—

"In my opinion a distinct judicial branch of the Civil Service is most undesirable. However defective the present system may be thought, it will not, to my mind, be improved by making the proposed distinction. It is the mixture of administrative and judicial functions which has helped to make the Civil Service what it is. Justice—prompt, pure, and simple—is what Natives like, and no one is so likely to give this as an officer who combines a knowledge of the people, their character, habits, and prejudices, gained in the executive administration of a District, with a sufficient knowledge of law and civil procedure, to enable him fairly and honestly to administer justice."

* * * * * *

"On the other hand, what can be more melancholy than to see in anticipation a department of purely judicial officers utterly wanting in experience and knowledge of the people with whom they have to deal, tied to their desks from morning till night, never moving about the District, no longer in daily intimate communication with the Native public, ignorant of Native feeling, diffusing law to excess, dispensing hair-splitting justice, making our Courts a bye-word with the people, trying and deciding a case on strict legal and judicial rules, and without that knowledge of the people, their habits, and nature by which alone we are able to value their statements in evidence, to weigh the facts and probabilities of a case, and to adjudge the degree of guilt which calls forth the penalty of the law. It is true that for a few years a junior Civilian may be employed during the first portion of his career in the general line; but what are five or six years in which to learn a new country, a strange people, and their innumerable castes, tribes, and religions. It is not to be learnt in a life-time."

Mr. Currie says—

"On the formation of a distinct judicial branch, the present principle of one responsible head of a District must be foregone. It is very doubtful whether the administration of a District would be as efficient as at present, were the administrative and judicial functions vested in separate officers. The loss in general executive efficiency would, in my opinion, more than counterbalance the gain in an improved judicial administration.

"My own opinion is, that the present judicial administration is far in advance of the requirements of the country. Both our Civil and Criminal Procedure Codes are adapted to a far higher state of civilization than obtains in this country."

Mr. Thornhill says—

"The creation of a distinct judicial branch of the service will inevitably lead to the gradual assimilation of our law Courts to those of England; and this process will be accelerated by the frequency of intercommunication which has now been established between the two countries, and by the tendency to govern India from England upon principles which European experience approves.

"Believing, however, that the time has not yet come for applying to Asiatics that strict system of jurisprudence which the high civilization and social condition of England has there rendered necessary, I think the need of a separate judicial branch of the Civil Service does not now exist."

Mr. Carmichael says—

"I do not consider the formation of a special judicial branch of the Civil Service to be in any way advisable or expedient. The most important cases argued in our Civil Courts are those regarding land and its tenures; and, unless an officer has served his apprenticeship as a Collector, and, what is more, taken pains to master our revenue system in all its details, he cannot, I submit, ever be a really good Judge. The best Judges on our judicial Bench were all good revenue officers in their day;—witness Mr. Deane, Mr. Sneade Brown, Mr. R. K. Dick, Mr. R. B. Morgan, and many others who could be named. A bad Collector—by which I mean an officer who is indolent, and who takes no interest in the welfare of the District entrusted to his charge—*may* make a good Judge because he may be possessed of sufficient capacity and of some legal acumen, both which he is forced to bring into play to get through the certain quantity of work that he is obliged to perform in a Judge's office; but a good Collector will make a far better Judge. He will be familiar with all questions regarding landed tenures of every description; and as regards the decision of cases regarding debts upon bonds, &c., it does not require a Solon to decide these."

I fear that this prolonged review of the evidence given by the various officers who have discussed this subject may be tedious. My reason for going into the matter so fully is that, in a matter on which I have no personal experience, I wish to set out clearly the evidence on which my opinion is founded.

Effect of the evidence. Position of District Officers should be maintained.

I now proceed to state the effect which a consideration of the whole of the evidence of which I have tried to review the salient points, leaves upon my mind. It seems to me that the first principle which must be borne in mind is, that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the Natives would be dearly purchased even by an improvement in the administration of justice. Within their own limits, and as regards the population of their own District, the

District Officers are the Government, and they ought, I think, to continue to be so.

This consideration narrows considerably the range of possible proposals as to the judicial organization. We must have all over the country real and effective governors, and no application of the principle of the division of labor ought, in my opinion, to be even taken into consideration which would not leave in the hands of District Officers such an amount of power as will lead the people at large to regard them as, in a general sense, their rulers and governors. This condition of the general problem involves another of no less importance, which has been insisted upon by every single person who has written upon the subject, and not, I think, with more force than it deserves. It is, that the District Officers should acquire as intimate a knowledge of the people as circumstances will admit, and this second consideration appears to me to establish conclusively the soundness of the view taken, I think I may say universally, throughout the papers now collected, that a certain amount of service in the revenue and general executive department is an indispensable preliminary to judicial employment. This conclusion, no doubt, has some inconveniences, but it seems to me as obviously true, as it is that a man ought to know the language of those whose disputes he is to decide.

And their intercourse with the people should be kept up.

I fully agree, in short, with the opinion expressed in many of the papers, that the experience of the people, their ways, their character and their language, which a District Officer gains by his constant intercourse with them, is analogous to the experience which an English Barrister gains of men and things by practice at the Bar before he is raised to the Bench, and that it would be as unwise and as injurious to judicial efficiency to make District Officers into Judges before they had acquired that experience as to make English Barristers Judges before they had practised a competent time at the Bar. Of course the requisite experience might be gained if the future Judges were themselves to practise, at all events, in some cases, as Barristers. I shall point out hereafter the manner in which this could at least, in a certain number of cases, be effected.

A third position largely insisted upon, especially in the answers received from the North-Western Provinces, also appears to me to be fully established. It is that in so far as the mere exercise of judicial function can be regarded as a judicial training, all Indian officials have it from the very beginning of their career, inasmuch as they all have to deal with criminal law, and, as Mr. Batten remarks, with all that relates to what in England would be called the law of real property.

District Officers have much judicial practice.

Fourthly, I think the evidence shows that, whatever may be the cause, the fact is that the administration of justice is not in a satisfactory state in any part of the Empire. Where the

Administration of justice not in a satisfactory state.

two branches are completely united, as in the Panjáb, the evils follow, which are pointed out by myself from second-hand information and upon general consideration of the subject, and by Mr. Forsyth from actual personal experience. They are, I may add, evils almost precisely identical with the complaints made by the Bengal Magistrates of the working of the same principle in so far as it is applied to their Province. If, on the other hand, the judicial and executive branches are to a certain extent separated, as in the case in the Bombay Presidency, the judicial branch falls into disrepute, because it is preferred by the inferior men. This appears to me exceedingly natural. Judicial appointments in India are, so to speak, the converse of judicial appointments in England. An English Judgeship is one of the principal prizes in a career, which is perhaps more tempting than any other to an ambitious man, fond of excitement and display, and conscious of the possession of the personal qualities which enable men to gratify such tastes. Moreover, the system of English procedure and numerous historical associations surround an English Judge, with perhaps exaggerated respect and personal distinction, and keep him continually before the public in a somewhat imposing attitude. The very opposite of all this is the case with an Indian Mofussil Judgeship: the Judge has no opportunity for display, or for the exercise of popular talents, and the dull routine of his work is not enlivened by the variety of occupation and change of scene which most District Officers enjoy. Moreover, the highest prizes of the profession are not usually won by Sessions or High Court Judges. The instances have been rare of late years in which a Judge of the High Court has been appointed to be a Lieutenant-Governor or Member of Council.

I may add to this general evidence of the unsatisfactory character of the present system pointed and weighty observations made upon it by the Members of Council, whose notes upon the whole subject are prefixed to the papers from which I have been quoting. Mr. Maine observes—"I think I do not misstate the opinion of nearly all the Judges, Civilians as well as Barristers, in the Bengal and North-West High Courts, when I say that they regard the great majority of the District Judges in both the Provinces as shamefully inefficient." Mr. Maine concludes his note by saying that in Bengal Proper the "interchanging of judicial and administrative functions was," as it seemed to him, "ruinous to the credit and efficiency of both branches of the service." Mr. Strachey added—"I quite agree with these remarks of Mr. Maine."

Published Notes of Members of Council.

The *fifth* and last conclusion which I draw from the evidence above stated is that, if no deeper and more radical change can be made, the Bombay system would appear to be the best of those which are now in operation in different parts of the Empire. The Bombay officials appear to be well satisfied with it. Bengal and Madras propose changes which, though slightly different in name, are identical with it in principle, and even those officers of the

Bombay system best of existing systems.

North-West, who are either opposed to all change, or who would prefer a change to the non-regulation system, regard the Bombay system as the best which can be adopted if a change must be made.

General inference.

What, then, is the general inference to be drawn from these conclusions? My inference is, that a very much wider and deeper change is required than the Bombay system, or any modification of it would afford. I will proceed to sketch in outline general principles on which I should propose to deal with the subject.

Object in view as good a system as is consistent with maintenance of British power.

We must ask first of all what is the object in view? And to this the answer is to obtain as good a system for the administration of justice as is consistent with the maintenance of the British power in India. This condition is indispensably necessary to the maintenance of any regular system at all for the administration of justice, or for any other form of good government. What, then, are the inevitable drawbacks to such a system? How far does it, and must it, fall short of the standard to which we are accustomed tacitly to refer—I mean to the administration of justice in England? It must, from the necessity of the case, fall short of that standard for a longer period than we can at present provide for in the following particulars:

Conditions under which justice must be administered in India.

1st.—It must, as long as it lasts, be a system administered by foreigners cast in a mould singularly different from that in which their subjects are cast.

2nd.—Justice must always be administered in a foreign language, and by men who have to learn by long observation and experience those elementary facts about the habits and feelings of the people which Native Judges would have learnt from infancy by all the common intercourse of life.

3rd.—Justice must, for a great length of time, be administered without the two great popular checks, to which we are so much accustomed in England, of the Bar and the Press.

4th.—Till some change in the national character takes place, justice must be administered amongst people to whom every form of falsehood is familiar, and who appear (as I am informed) to regard falsehood in a European Court as absolutely no crime or sin at all. In other words, the Judges must, in most cases, guess at the truth.

Frequent failures of justice inevitable.

What we have to do is to get as good an administration of justice as is compatible with those conditions. They impose upon us very frequent failures of justice, and the conciousness of this fact has, no doubt, coloured all legislation on procedure. As I shall point out more in detail, each of the codes of procedure proceeds upon the notion that an elaborate and intricate system of appeal is a security for the administra-

tion of substantial justice. I shall consider the merits of this theory hereafter.

Nature of duties of Judges in India.

Next, we must remember that in this country the Judge is, in a large proportion of cases, in a totally different position from anything to which we are accustomed in England. He has to investigate the truth for himself, and has thus to perform, more or less, the functions which in England are entrusted to the Judge, the Jury, and the Counsel and Attorneys on both sides of the question.

Divisions of labor.

I propose to criticise the existing Codes of Criminal and Civil Procedure hereafter. For the present I will confine myself to a consideration of the bearing of these conclusions upon the question of the division of the two branches of the service. They lead me to the opinion that the best division of labor at present to be had would divide not the judicial and executive branches of the service, but civil jurisdiction and criminal jurisdiction united with executive power.

Reasons for division of labor suggested.

The reasons of the first are as follows: I have already observed that it seems to me essential that the position of the District Officers should not be materially weakened; but if their whole judicial power were taken from them and confided to purely judicial officers, nothing would be left in their hands except miscellaneous executive functions. They would have the duties of engineers, health officers, way wardens, &c., but they would have no authority which would excite in the minds of the people at large either hope or fear in regard to them, and they would certainly be deprived of one most effectual way of becoming acquainted with their habits and feelings. The exercise of criminal jurisdiction is, both in theory and in fact, the most distinctive and most easily and generally recognized mark of sovereign power. All the world over the man who can punish is the ruler. Put this prerogative exclusively in the hands of a purely judicial officer who has no other relations at all to the people, and who passes his whole life in a Court, and I can well believe that the result would be to break down in their minds the very notion of any sort of personal rule or authority on the part of the Magistrates.

Summary of arguments as to District Officers.

I do not think that, situated as we are, the law can ever be carried out effectually, except in one of two ways, namely, either by the strong personal influence of Magistrates known to and mixing with the people, or by an enormously increased military force. In a few words, the administration of criminal justice is the indispensable condition of all government, and the means by which it is in the last resort carried on. But the District Officers are the local governors of the country, therefore the District Officers ought to administer criminal justice. Also, it is necessary that the District Officers should have personal and friendly relations with the people. But this, under the circumstances of British India, can be secured only by investing them with miscellaneous executive functions.

Therefore it is necessary, upon the whole, that the District Officers should both administer criminal justice and discharge miscellaneous executive functions.

It will not, of course, be supposed that I mean to throw doubt on the utility of dividing, as far as possible, judicial and executive magisterial duties between different Magistrates. Practically, the Joint Magistrate is in most Districts the criminal judge in common cases, and in this there is no harm, but, on the contrary, great advantage. The division between the Magistrates themselves of judicial and executive duties is one thing, the union of these powers in Magistrates as a class is quite another. The scheme proposed by the Bengal Government, to which I have already referred, would probably be as good a mode of obtaining the first of these objects as could be suggested. The extent to which it should be adopted is a question of economy. If the state of the revenue is such that a sufficient number of Magistrates can be afforded to enable one set to confine themselves principally to judicial, and another set to confine themselves principally to executive, functions, no doubt the advantage will be great; but this, however important, is a matter of detail, which depends not on general principles, but on the position of affairs at a given moment.

These reasons do not apply to civil jurisdiction.

I see nothing to justify the opinion that the same principles apply to civil justice. Here and there, no doubt, the opinion is expressed that the Natives like all power to be in one hand, and find it difficult to understand the distinction between civil and criminal justice; but the great bulk of the evidence is in the other direction, and I do not think that it would be at all in accordance with the general principles on which our policy proceeds to consider the feelings of Natives on a subject on which we are clearly right as a final reason for adopting this or that system. It is clear that there is a distinction in the very nature of things between criminal and civil jurisdiction, which becomes plainer and plainer as civilization advances, and I can see no reason to doubt that the Natives will speedily learn to understand it. If, then, this objection is put aside, it appears that by erecting civil jurisdiction into a separate branch of the service from criminal jurisdiction and general administration, we should effect the best division of labor of which circumstances will permit. The subject has a close and obvious connection with the next question to be discussed, which is, whether any, and what, special training should be provided for officers who are to fill judicial situations?

CHAPTER IV.

SHOULD ANY, AND WHAT, SPECIAL TRAINING BE PROVIDED FOR OFFICERS WHO ARE TO FILL JUDICIAL SITUATIONS?

Question of judicial training long under discussion.

THIS is one of the most prominent of the questions which have been discussed for the last ten years in connection with the general subject of judicial organization. It was, indeed,

one of the first to be raised. The general question has been under consideration for at least 34 years. The first paper in the Selections from the records of the Government of India upon the formation of a separate judicial branch is dated in 1836. In September 1859 Mr. Howard, then Director of Public Instruction at Bombay, addressed to his Government a letter which was forwarded to the Government of India. It excited much attention. Its effect is shortly as follows: The Natives are receiving a good legal education. The Civil Servants are receiving no such education. English Barristers worth having cannot be got to take District judgeships, and they would know nothing of the country if they could. Hence "the time is fast coming when lawyers trained in this country will be procurable in such numbers and possessed of such professional attainments and practical experience as to constitute a formidable body of rivals to the untrained Judges of the Civil Servants." If then the Bench is not to be given up to Natives, the Civil Service Judges must be specially trained.

Demand for "scientific" training of Judges.

Since that time the demand for scientific instruction in law, and for instruction in Roman law in particular, which is supposed to be specially scientific, has become somewhat frequent.

It is not necessary to enter upon the very wide discussions which the use of such terms invites. The question whether such phrases as "scientific" can with propriety be applied to law, and whether the study of Roman law is entitled to the great commendations which have of late years been bestowed upon it, are wide, and there is room for two opinions upon them. They are, however, beside the present purpose.

Civil Servants should study the law of British India.

Whatever may be the value of Roman law, or of works like those of Bentham and Austin, on the fundamental ideas of jurisprudence, there can be no practical doubt that the system which civilians in general not only may but must study, and by which their minds will be most affected, is the system in the administration of which they themselves will have to pass the greater part of their Indian career, that is to say, the system of Anglo-Indian law which we have introduced and are now actively engaged in building up. It must be remembered, too, that law is more popular than any other subject that is taught in the various universities and colleges which we have established, and that the law taught there is the law of India.

Anglo-Indian law is substantially English law.

Some persons may regret that the methods and principles of the Roman law have not had a wider influence on English law than has, in fact, been the case. Be this as it may, it is now practically impossible to make any change. The law of "justice, equity, and good conscience," which the Courts administer in all cases not expressly provided for, is, in practice, English law with variations. The whole of the statute and case-law of India is framed upon English models, and is, in the case of Acts of Parliament, English law in the strictest sense of the word. It follows that the law to be administered

in India, and, therefore, that the law which civilians ought to learn, is, and will continue to be, what may be called Anglo-Indian law. A great part of this law now is, and nearly the whole of it soon will be, as well fitted for educational purposes by its theoretical merits as it obviously is by every practical consideration. When we have already an excellent body of codified law in full operation in India, which Indian civilians must of necessity learn, it seems hardly necessary to look further for the materials for a good legal education.

I have not space here for a general review of the state of Anglo-Indian law, but a few remarks upon it may be made in illustration of this remark.

Indian Codes.

The following Acts have been already passed:

(1.) The Penal Code.
(2.) The Indian Succession Act.
(3.) The Code of Criminal Procedure.
(4.) The Code of Civil Procedure.
(5.) The Indian Limitation Act.

The following will, I hope, be passed in the course of a few months:

(6.) The Indian Contract Law.
(7.) The Indian Evidence Act.

Steps have been taken in England towards a consolidation into one Act of the Acts of Parliament relating to India. This would form the constitutional statute-law of the Indian empire.

Indian Codified Law.

Their advantages.

Such an Act, together with the Indian Acts mentioned above, would include in a single volume of very moderate size a far larger amount of law thrown into the shape of specific propositions and arranged in a consecutive and systematic manner than English lawyers in general can possibly be acquainted with when they begin the practice of their profession.

The best illustration of the advantages of this state of things is supplied by the Indian Penal Code. I do not hesitate to say, and I speak with much experience of the subject, that a young man of good capacity would get a far better and more scientific notion of criminal law in general, and of the Indian Criminal Law in particular, from a week's study of the Penal Code, than he could get from any amount of study of such books as Roscoe's Criminal Pleading, Archbold's Criminal Practice, or even Russell on Crimes. The Penal Code might be improved in several important particulars, both in substance and in form; but no one, who has not a professional acquaintance with the difficulties of English criminal law, can possibly measure the importance of the improvement which it has effected.

The same, I am convinced, is true of the Indian Contract Law and of the Codes of Civil and Criminal Procedure. The Succession Act is of

less practical importance than these, as it applies only to Europeans; but no one can judge of its merits who is not acquainted with the corresponding parts of the law of England, their unspeakable prolixity and intricacy and utter want of any sort of system, except that which it has been worth the while of occasional text-writers to bestow upon them.

Besides the Acts mentioned, there are a large number of other Indian Acts which, though not called codes, are in fact codes, that is, they actually comprise in one specific enactment all the law relating to a given subject. This is the case with a great number of Acts passed recently, of which I may specially mention the various Courts Acts, which will enable a young man, as soon as he is posted to any Province, to learn by reading one short Act its judicial organization; the Registration Act, which exhausts the subject of registration; the Prisons' Act and many others, of which the same might be said with reference to their several subject-matters. Many English Acts of Parliament also have been re-enacted in India with certain modifications and adaptations. Such are XIII. and XIV. of 1841 and XX. of 1844 relating to mercantile law, III. of 1865 relating to carriers, V. of 1866 relating to bills of exchange, X. of 1866 relating to companies. All these are definite and express law as far as they go.

A young man coming out to India, with a sound knowledge of the Acts which I have mentioned, would know quite enough law to start with, and to serve as an introduction to as much more as his natural disposition would induce him to learn. It must also be remembered that the law with which an Indian civilian has to acquaint himself by practice is infinitely easier than the law of England. It may, I think, be reduced in time to a very small compass indeed. The following analysis of the

Indian statute-law not unwieldy. Its extent.

existing Acts and Regulations will set this in a clear light. Assuming that the five following measures of consolidation become law, *viz.*,—

(1) the Local Extent Bill,
(2) the Obsolete Regulations repealing Bill,
(3) the Pension Bill,
(4) the Madras Courts Bill,
(5) the Tuccavi Bill,

there will remain—

(1)	Bengal Regulations		115
	of these, there are applicable to—		
	Bengal Proper ...	26	
	North-Western Provinces ...	29	
	Bengal and North-Western Provinces...	60	
(2)	Madras Regulations		47
(3)	Bombay ditto		28
			190

Of Acts, there will be 409 classified as follows :

(1.)	Acts applicable to British India ...	180
(2.)	Acts applicable to Presidency Towns ...	21
(3.)	Acts applicable to Bengal and North-Western Provinces	19
(4.)	Acts applicable to Bengal only	33
(5.)	Acts applicable to North-Western Provinces only	23
(6.)	Acts applicable to Madras only	35
(7.)	Acts applicable to Bombay only ...	45
(8.)	Acts applicable to the Punjab only ...	13
(9.)	Acts applicable to Oudh only	13
(10.)	Acts applicable to the Central Provinces only	4
(11.)	Acts applicable to Burmah only ...	15
(12.)	Acts applicable to Coorg only	2
(13.)	Acts applicable to Northern India only ...	6
	Total ...	409

There are besides these—

Acts of the Bengal Legislature	... ...	74
" Bombay "	... ...	76
" Madras "	... ...	55

The average number of Acts passed by each Government since they first obtained legislative powers ten years ago, is, for Bengal 7·4, Bombay 7·6, and Madras 5·5.

To these may now be added the rules having the force of law in Hazara, the Peshawur Districts, and those which are on the point of being enacted in the Ajmere District.

Further consolidation measures which I need not now specify will, I hope, ultimately reduce the total number of Acts applicable to British India to perhaps 150, and reduce the Bengal regulations to the narrowest possible limits. The consolidation of the revenue regulations would absorb no less than 46 of them into two or three Acts, and that of the police regulations would absorb eight more. Of those which remain many are fragmentary, many are re-enactments of the same regulation for different parts of which are now the North-Western Provinces, and so on.

With regard to the other Acts, it appears from the list above given that a majority of them (229) are of local application.

Now, an officer in Bombay obviously need not acquaint himself with Acts which extend only to Madras or the Panjáb. The largest number, therefore, with which any one officer can be concerned is 225, *viz.*, the 180 general Acts and the 45 (the largest number of local Acts) applicable to Bombay. Of these, however, the largest number by far are Acts which no one need look at, unless and until he has occasion

to act upon them. For instance, Acts relating to Cantonment Magistrates, to marriage registers, and the like, would, of course, be familiar to those who had to act under them; but it would be mere waste of time for officers not immediately connected with the administration of these Acts to study their provisions. It is quite enough if they have a very general notion of their existence and objects.

Acts of subordinate legislatures.

The same remarks apply with even greater force to the Acts of the subordinate legislatures. They refer, probably in most instances, to matters connected with local police and administration.

Judicial decisons, intricate and numerous.

The part of the law which is composed of judicial decisions is very far from being in a creditable state. It urgently requires re-arrangement; but it might, with the greatest ease and at a trifling expense, be reduced to a compass even smaller than that to which the statute-law may be reduced.

Present state of things.

The present state of things is as follows : The four High Courts and the Chief Court of the Panjáb are Supreme Courts of Appeal for their respective Provinces. They do not recognize each other's decisions as binding authorities, and, except in the comparatively rare case of appeals to England, no authority exists by which their proceedings can be overruled. This naturally produces a considerable conflict of law and corresponding uncertainty. This is, however, only one branch of the evil produced by the existing state of things. In the large number of cases for which no specific law is to be found in the Indian statute-book, the Courts have to decide according to the " law of justice, equity, and good conscience," and in other cases they have to decide according either to Hindu or Muhammadan law. The law of "justice, equity, and good conscience" means, in practice, the Judge's conceptions of English law in so far as they regard it as suitable to the circumstances of India, though particular Judges, who may have studied or have a special taste for Roman law in its older or more modern forms, will occasionally take it as their guide. All of them, of course, will listen in all cases to English authorities, and they consider themselves bound by the decisions of their predecessors. At all events, however, the grounds on which their decisions proceed are such as to give them a very wide judicial discretion. This is, under the circumstances of India, quite inevitable.

Indian reported cases.

The decisions thus continually pronounced by five independent Courts are carefully collected and re-published in the form of reports. These reports are of very different degrees of merit: some are very good, others very bad indeed, consisting merely of reprints of the written judgments of the Judges, with no statement of the facts of the case, or of the arguments of the advocates. These reports, however, are now increasing in number so rapidly that a complete set of them at the present moment would consist of upwards of 60 thick volumes, which are growing at the rate of four volumes a year at least.

Illustrations—Code of Civil Procedure.

No one who is acquainted with the course which has been run by English law under the English system of reporting, will be surprised by the course which the matter has taken, and is taking, in India. Law books on the regular English pattern are numerous. Such a law book is usually a mere repertory of cases tacked on to some Act or set of Acts, and as incapable of being read or remembered as a dictionary or any other book of reference. Such books, in fact, are mere indices, and, in my opinion, do more to prevent people from gaining rational or general notions of the law than all other causes put together. For instance, a Magistrate wishes to acquaint himself with the Code of Civil Procedure. The Act is a long one, containing 388 sections; but, by carefully reading it through, a good general knowledge of the whole system may be obtained. The published editions, however, are not intended to give any sort of general notion of the subject, still less are they meant to state the principles on which the code is founded, or to point out the objects which it is intended to effect. Their one purpose is to serve as arsenals of precedents by which the parties to a suit may attack each other and embarrass the Judge, and that purpose they effectually carry out. Mr. Wilkinson's edition of Mr. Broughton's edition of the Code of Civil Procedure and of the Acts which amend it, quotes about 2,500 cases on that subject alone. The

Indian Digest.

Indian Digest published last year, and containing notes of the cases decided by the four High Courts down to the time of its publication, is asserted by its editors to be a summary of 37 volumes of reports of cases decided in eight or nine years. It contains 808 large octavo pages printed in small type and in double columns. The mere names of the cases fill 90 such pages. There are about 100 cases in each page, so that at least 9,000 cases would appear to have been decided upon various matters in the course of the eight or nine years over which the work extends. It may, indeed, be said, speaking roughly, that the additions which the Courts make annually to the law are about four volumes containing about 1,000 decisions. I do not know what a complete set of cases on Indian law would cost, but I am informed that it would cost about Rupees 250 a year to keep it up.

Evils of this state of things.

This can hardly be regarded as otherwise than a most mischievous state of things, and one which ought not to be permitted to continue. I believe that most of the Judges of the High Courts share in this opinion. Some of the most distinguished of them have expressed themselves to me most strongly as to the mischief which is done by the enormous multiplication of reports, the indiscriminating manner in which they are accepted as of authority co-ordinate with that of Acts of the legislature, and the very poor quality of many of the reports. They have told me in particular that the effect of this state of things upon the Native Bar is peculiarly bad. The Native pleaders and vakils are said to have plenty of quickness and excellent memories, but to be wanting in power and grasp of understanding. On persons of this temper a vast mass of pre-

cedents is apt to produce a most injurious effect. It diverts their minds from the object of obtaining any real comprehensive knowledge of law to that of amassing a number of isolated unconnected rulings with which they can pelt their antagonists.

Remedy.

Such is the evil of the present condition of the Indian Case Law. The question naturally arises—What is the remedy?

In order to give a full answer to this question, it is necessary to state the different classes into which case-law may be divided.

Cases worth and not worth reporting.

The first distinction to be noticed is the distinction between cases which are worth reporting and cases which are not worth reporting.

If reporting is taken up as a mere private commercial speculation, every case is worth reporting because there is no case which may not, under some circumstances or other, be used as a precedent useful to some one or other in some argument or other. The reporter's object, if the reports are allowed to be a mere private commercial enterprise, is to sell his reports; and, on the one hand, he naturally wishes to make them as complete as possible, in order that others which are more complete may not supersede or compete with them; whilst, on the other hand, as the purchaser is practically obliged to buy the reports for fear his knowledge should fall behindhand, it is the obvious interest of the reporter to bring out as much matter as he can.

Many reports are mischievous.

A vast number of these reports are of such a nature that their publication is in the highest degree mischievous, as tending to overload the law with needless precedents, and so to confuse and hamper the whole administration of justice. In many cases no really new point of law is decided, but merely a question of fact between two or more parties. In other instances points of law are decided or remarked upon incidentally and hastily, and in such a manner as not to express the careful and deliberate opinions of the Court. Thus, the High Court of Calcutta is divided into division Courts of two Judges each. All their judgments are published just as they are delivered (generally without any proper statement of facts to render them intelligible). Without any disrespect to the Court, it is surely clear that to convert every judgment so delivered into a binding precedent, that is to say, into a law, is to attach to them a degree of importance which they are very far from deserving.

In other cases the point decided is so minute, so peculiar, or so much dependent upon the particular facts of the case, that it is not worth recording.

In almost every case the length of the report is out of all proportion to its importance. To print everything at full length, and to leave the reader to pick out what he wants, is always the easiest of all ways of reporting a case, is the most profitable to the publisher, and the most expensive to the public.

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Reports published as a private speculation must appear at stated intervals, and the customer is apt to think that, if he has not good measure, he is defrauded. A really careful report ought to mention no one fact that is not essential to the full understadding of the judgment, and to omit no one fact that is essential to it.

If this rule were carefully observed, I believe that all reports might be reduced to a small fraction of their present bulk.

Cases which are not precedents.

There are numerous cases, too, which, however important and however well-decided they may be, ought not to form precedents. Cases on the construction of written documents should never be reported unless they decide some broad principle. Can there be a less satisfactory argument than this? A and B must be held to have meant so and so by such an agreement, because C and D were held to have meant something like it by a somewhat similar agreement. In nearly every instance such cases should be decided on their individual merits.

Cases which should be reported.

So much for what is not worth reporting. As to what is worth reporting, it is right to say that hardly any kind of legal composition is so instructive as a full and good account of the arguments and judgments delivered in cases of importance. When able Counsel and distinguished Judges do their very best upon a really important matter which they have to deal with in the discharge of their professional duty, there can be no doubt that the record of their proceedings is by far the most instructive and valuable kind of legal literature, or that they deserve to be most carefully recorded. Hardly any English law-book, to take a splendid example, can be compared in value to Lord Stowell's decisions.

The Judges are a branch of the legislature.

It is not because I underrate, but because I fully appreciate, the importance of the Judges as an important branch of the legislature (which they unquestionably are and must always continue to be) that I wish their legislation to be set on as satisfactory a footing as possible, and to have full justice done to it.

Cases upon written, and cases upon unwritten, law.

Suppose, then, that by any means those cases only which ought to be reported were in fact reported, they would be divided into—

(1)—cases upon written law, and
(2)—cases upon unwritten law.

By cases upon written law I mean cases deciding questions as to the meaning of Acts of Parliament, Acts of the Government of India, or Acts of the legislatures of Bengal, Madras, and Bombay.

All such cases are in effect amendments of the statutes to which they refer. They decide what the legislature must be supposed to have meant by the words which they used. In short, they detect the existence of a flaw in the drafting of the Act, and apply a practical remedy to it. The course of litigation is in short a continued process of

criticism upon the drafting of the Acts of the legislature. The Judges are the responsible and constitutional critics of the legislature, and they are called upon to exercise their critical powers in those cases only in which obscurity or vagueness in the expressions of the legislature are brought before them by litigants.

Value of cases on written law.

This, I think, is, or rather might be made, an invaluable aid to legislation. When an Act becomes the subject of a great number of decisions, the legislature, and not the Judges, are to blame; and the Act should be amended so as either to incorporate the judicial decisions delivered upon it, or, if the intention attributed by the Judges to the legislature was not its real intention, to express that intention more clearly. To give an illustration: Section 2 of the Code of Civil Procedure is in these words—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim." A note of the cases decided upon this section fills ten large octavo pages in very small print in Mr. Wilkinson's edition of Mr. Broughton's edition of the Code. This shows that the section is drafted in an exceedingly loose manner, for it is obvious that its author could not have considered and provided for the various questions to which those ten pages of decisions give the answers before he drafted his section. If he had done so, the necessity for all these decisions might have been avoided by re-moulding the section and adding further explanations, and the expense connected with them might have been saved.

It is nearly impossible, when an Act is first drawn, to foresee every case which can arise in reference to the subject, unless it has already been exhausted by judicial decisions. Judicial decisions are the material from which codifying Acts should be drawn, and it cannot, I think, be expected that a really important Act of this sort should reach its full maturity till after several re-enactments.

The Code of Criminal Procedure will be re-enacted next winter. I hope that the same process will be performed with the Code of Civil Procedure and with the Penal Code at no very distant date, and I should say that this process ought to be repeated at least once in every five years for every important Act. The Government ought to re-enact its Codes as often as a law-bookseller would bring out a new edition of them. Every book like Mr. Broughton's is a reproach to the Government, however creditable it may be to the author, for its existence shows that the Code does not fully explain its meaning, which it most unquestionably ought to do.

That this was the intention of the authors of the Penal Code appears from the following extract from their first report: "Every case in which there is a difference of opinion in a Court composed of several Judges ought to be forthwith reported to the legislature......... ...All the questions thus reported might with advantage be referred for examination to the Law Commission. Every successive edition of the

Code will solve all the important questions as to the construction of the Code which have arisen since the appearance of the edition immediately preceding. Important questions ought to be settled without delay, ………… and no point of law ought to continue to be a doubtful point more than three or four years after it has been mooted in a Court of Justice. An addition of a very few pages to the Code will stand in the place of several volumes of reports, and will be of far more value than such reports, inasmuch as the additions to the Code will proceed from the legislature, and will be of unquestionable authority, whereas the reports would only give the opinions of the Judges which other Judges might venture to set aside."

It would not of course be worth while to repeal and re-enact every Act upon which a case might be decided so as to meet the decided case; but I think that, say once a year, an amending Act might be passed, which should dispose of all the defects in the statute-law brought to light in the course of the year by the cases decided upon them. Such an Act would reduce to the form of a small number of *errata* (which every officer would be able to fill in for himself in his copy of the Acts) cases which would fill many pages if printed *in extenso*, and once in every five years or so the Acts which had been most frequently amended might be re-drawn.

Such an annual amending Act, with the help of re-enactments at proper intervals, would dispose of all the cases upon written law.

The cases upon unwritten law would require a different treatment.

Cases upon unwritten law.

Instances do at times occur in which a full report of a decided case is of the highest possible interest and value, but there are many other instances in which all that is really wanted is a carefully-worded marginal note of a few lines. To word such a note properly may be, and often is, far more difficult than to report the whole case at length; but with proper care it may be done.

Cases upon unwritten law decide only the precise point which comes before the Court, and they thus often raise as many difficulties as they solve. The Judges will often find occasion to say—"I avoid saying what our judgment would have been under such and such circumstances," or 'the facts of this case are such that it is unnecessary to decide such a question.' The result of this is, that decisions upon unwritten law are frequently narrow, partial, hesitating, and indefinite, nor do they become complete until litigation happens to complete them. Some years ago a man was tried in England for bigamy, and his defence was that he had not heard of his first wife for seven years. The question arose whether he was bound to prove this affirmatively, or whether the prosecution had to show that he had heard of her. The Judge said he would reserve the point if the man was convicted. The man was acquitted, and the Judge observed, with an air of disappointment—"Well, I suppose, that point never is to be decided at all." In England, where there are abundance of lawyers and judges, this undecided, accidental judicial legislation is a far smaller evil than it is in India, where the law is administered by

officers who are fully employed, who have little time for study, and no assistance from the bar. The value of every hour of judicial time may be easily calculated by dividing the Judge's salary for the day by the number of working hours which the day contains. But every hour which is consumed in arguments, which timely legislation might have decided, is wasted. Assuming a High Court Judge to work 25 days in the month, and to sit seven hours in the day, it will be found that every hour of the time of a Division Court of two Judges costs the public about Rupees 46; every day about Rupees 332. When we recollect how many days are wasted in wrangling over questions which a stroke of the pen might have decided beforehand, some idea may be formed of the wastefulness of the present maimed, imperfect, and complicated system of judicial legislation. The Judge's pay, however, is by no means the only money thus wasted. We must bear in mind the expense to the parties, the labor of subordinate officers, the expense of needless reports and other law-books, and the encouragement given to idle and often fraudulent litigation before we have made any approach at all to the bottom of the mischief.

What, it may be asked, is the practical remedy? The answer is —To regard reporting as a branch of legislation, which it really is, and to treat it accordingly.

Remedy suggested.

The process might be as follows:

1*st*.—No reports whatever of cases decided in India after a certain date should be permitted to be quoted as authorities in any Court of Justice, except the statements and reports hereinafter referred to.

2*nd*.—The Government should be authorized and required to publish half-yearly statements of such of the points of law decided by the Judges of the High Courts as they thought right.

3*rd*.—No such statement should be published unless it was signed by a certain number at least of the High Court Judges. The number should be so arranged that more than one High Court should be represented, and that, say, three Judges should warrant each statement.

4*th*.—Government should be empowered to ask the Judges questions suggested, but not decided, by actual cases, and the Judges required to state the law in answer to such questions.

5*th*.—Such statements of the law should have the same authority as a full bench ruling of a High Court.

It would be necessary to embody these principles in an Act which would have to settle various important details which readily suggest themselves, but which I pass over for the present. The executive arrangements for working the Act might be as follows: They would involve no extra expense, except the appointment of an Under Secretary to the Legislative Department, which might, I think, be provided for by a re-arrangement of the inferior staff of the Department.

Scheme.

The Government at present pays the salaries of the reporters and subscribes largely towards the reports which are published and sold by various book-sellers. I would continue the salaries to the reporters, but discontinue the subscriptions for the reports. The reports should be printed at the Government Press and forwarded, when printed, to the Legislative Department. If an Under Secretary were added to the establishment, they might, within a very short time after they were received, be disposed of as follows:

How reports might be dealt with.

The reports would go, in the first instance, to the Member of Council in charge of the Department.

He would see with very little trouble—

1st, which of the reports referred to written, and which to unwritten, law;

2nd, which of those that referred to unwritten law were of real importance, and which might be left unreported.

Those which referred to written law would be set aside as materials for the annual amending Act.

Those which referred to unwritten law, and were worth reporting, might be further divided into two classes, *viz.*, those which were worth a minute report, and those which might be reduced to the form of short statements or propositions.

The Secretary and Under Secretary to the Department might draw up these statements, and might, in concert with the reporter, go over the reports of the cases which deserved to be fully reported. When the whole was approved by the Member of Council in charge of the Department, the reports and statements might be forwarded to the Court which had decided the case, together with any questions which the particular decision suggested, and upon these questions the Judges should give their opinions. When the whole had been brought into a shape which the necessary number of Judges were prepared to sign, it might be published in the *Gazette*.

The effect of this process would be that the legislative power which the Judges possess, and which it is highly desirable that they should possess, would be exercised in a regular and responsible manner, and would be confined to subjects worth legislating about; whereas, at present, they legislate upon nearly every case that is brought before them, and the results of their legislation are recorded by irresponsible persons as a mere private speculation. In order to avoid the possibility of the suggestion that the Government suppressed any judgment of importance, it might be well to give the Judges of each High Court power to publish, on their own authority, the report of any case decided by them or any of them. Practically, such a power would enable them to compel the Government to publish the case.

It would be absolutely essential to the success of any such scheme that the executive Government should confine itself to the position of authorized and exclusive reporter, but that the real power should rest with the Judges. It would be most inexpedient and improper for the executive Government to trench in the smallest degree upon the powers of the Judges. The object of the scheme is, indeed, to invest the exercise of their legislative powers with some of the regularity which their extreme importance renders desirable.

The adoption of this scheme would cost absolutely nothing, and it would save an amount of uncertainty, litigation, and delay which can hardly be estimated.

Summary.

What I have said on the training of the Judges may be summed up in a few words as follows:

(1.)—The proper subject to train them in is the law which they will have to administer, *viz.*, the law of British India.

(2.)—A sufficient part of that law to answer all educational purposes now is, or very shortly will be, in a state well fitted for such purposes.

Further suggestions.

There is, however, another branch of the subject which deserves attention. It would, I think, be practicable by encouraging some of the civilians to be called to the Bar, and by throwing open all Indian judicial appointments to lawyers, whether Native or European, practising in India, to obtain a sufficient supply of Judges, and to provide that the legal business of Government shall be conducted better than it is at present.

Suggestion as to training Judges by giving them subordinate appointments.

It has been proposed that posts should be created which might serve as a sort of training schools for Judges. Registrarships in particular are proposed for this purpose. I do not like to express any very decided opinion upon this point, but I may observe that my own experience is not favorable to such a proposal. The great qualities required in a Judge are insight into evidence, sound discretion in dealing with it, and prompt decision in forming his judgment upon it. I do not think that these are qualities which can be acquired, or which are likely to be favored, in a subordinate situation involving little or no personal responsibility. The excellence of English Judges arises to a great extent from the fact that at the Bar they have learnt to form opinions and take responsibility, and I hardly think that a Registrar would learn very much from seeing the Judge do his work and assisting him in minor details, which is practically what he would do.

Legal patronage of Government of India.

On the other hand the Government of India has in its hands already the means of securing the services of as many and as able barristers as it can possibly want, and I wonder that they

should be neglected. It has a vast amount of legal business of all sorts, both criminal and civil cases, and educational work in the shape of Professorships at the Universities, and it has to retain the services of Advocates General, Government Advocates, and private Barristers on all sorts of occasions and at a very large expense. In other words, it has it in its power to assure Barristers of abundance of business from the first day they land in India, and to reward the most successful of them by prizes, the money value of which is not far inferior to those of the most successful members of the English bar, whilst they would be much more speedily obtained.

This opportunity is entirely wasted. It might be employed as follows:

How it might be used.

A certain number of the candidates who succeeded in the competitive examination, say two or three in each year, might be allowed to remain in England till they were called to the bar. They would thus be both barristers and civilians. On their arrival in India they should be appointed to be Deputy Government Advocates and public prosecutors, and should be bound, in consideration of their pay, to take up all Government cases, both civil and criminal. On the other hand, they might be allowed to take private practice, as Civil Surgeons do. Their course of promotion would naturally be rather in the judicial than in the executive line, but it would not be so of necessity, and it would include the chance of such appointments as those of the Advocates General at the Presidencies,—appointments which would, in most cases, enable a man to make a fortune in comparatively few years. These appointments are now almost invariably given to private barristers, and when it is necessary to employ a private Barrister for a particular purpose, he has to be paid what would be regarded by an English Barrister as fees of fabulous amount.

Advantages of this.

By this step the Government might have in the ranks of the Civil Service as many and as good Barristers as it might choose to employ, and that at no, or hardly any, additional expense. As it is members of the Civil Service are already in many cases charged with the management of prosecutions, and it is probable that the necessity of appointing public prosecutors all over India will soon be recognized. To incorporate the best Barristers in India into the Civil Service by the process suggested would be quite as easy as it has been found to incorporate the best physicians and surgeons in India into the service, and if this suggestion were adopted, there would soon be no need at all to send out Barrister-Judges from England to the High Courts. This would be a great advantage. A Barrister who adopts India as his profession at 25, after marked success in a competitive examination, is likely to be a much abler man than one who retires to an Indian judgeship fifteen years later. A man who is really succeeding at the English bar at 40, would seldom be tempted to come to India by any salary which the Indian finances

could offer, and a man who at that age is not succeeding, may be said in most cases to have failed.

Judgeships should be open to all.

It would, I think on every account, be inexpedient to limit to such civilians the appointments to Indian judgeships. I would, on the one hand, encourage civilians to be lawyers, and, on the other, enable lawyers not being civilians to receive judicial appointments. I think that all District and Sessions judgeships, as well as the High Court judgeships, should be thrown open, and that the abler Natives should be appointed to them largely, especially in the quieter parts of the country. I believe that, in this way, it would be possible in the course of a few years to have a thoroughly good judicial service and a regularly organized legal profession, and in particular to make the service a bond of union between the Natives and ourselves. The Native appointments to the High Court of Calcutta have answered admirably, and I hear on every side excellent accounts of the younger Munsifs and subordinate Judges who have been educated in our Universities.

I may here observe that it appears to me quite unnecessary to pay Native Judges at anything like the same rate as English Judges or officials. An Englishman who adopts India as his profession has to be paid a large salary by way of compensation for the following amongst other matters: He has to live in an unhealthy and unpleasant climate; he has to leave his home for the best part of his life; he has to live in a very expensive manner, *e. g.*, the expense of educating his children is greatly increased; he has to retire from active life far earlier than would be the case if he were in England, and yet at a period when it is practically too late for him to turn to other pursuits. The high pay which he receives in India is in the nature of compensation for all this. Is it obvious that no one of these considerations applies to a Native official? Yet Native Judges are paid in many instances as highly as an English Police Magistrate or County Court Judge, though living in England is far more expensive for an Englishman than living in India is for a Native of India.

CHAPTER V.

Does the system of criminal and civil procedure require any modification?

Latitude of appeal characteristic of all Indian procedure.

The distinctive and characteristic feature of Indian procedure, both criminal and civil, is the extreme latitude of appeal which it permits, and the system of supervision with which that of appeal is interwoven. Appeal has apparently been always regarded in India as the one remedy for the defects inherent in our administration of justice specified above. I do not think that its weak side has been sufficiently noticed. I shall, therefore, make some general remarks upon the subject before I consider the particular provisions of the two codes.

(1.) Even when Judges are incompetent or corrupt, they will, as a rule, give many more right judgments than wrong ones. Most cases are very plain. Generally speaking, it is both easier and more creditable to give a right judgment than a wrong one. Even if a bribe is given, it is quite as likely to be a fee for doing justice as to be a fee for doing injustice. Hence the right to appeal is, as a rule, a right to contest a righteous judgment. The appeal will be brought more often by a man who does not like to submit to a right judgment than by a man who is aggrieved by a wrong one.

Absolute right of appeal. No check upon an incompetent Judge.

(2.) An absolute right to appeal on the part of the defeated party reduces the Courts of First Instance to insignificance, for it is nothing less than a declaration that their decisions are not to be binding unless the parties acquiesce in them.

Reduces Courts of First Instance to insignificance.

There is, no doubt, a way of avoiding this result, and it has been largely adopted in India. It is to let the first Judge take the evidence and give his decision, and to let the second Judge act upon the evidence which the first Judge has taken, and give a new decision. This course, no doubt, makes a difference between the functions of the two Judges, but it does so by producing a divided responsibility. It gives a confessedly bad Court proper materials for forming an opinion upon a subject on which its judgment is to have no weight. It gives what ought to be a good Court bad materials for forming an opinion upon a subject on which its judgment is to be conclusive.

How this result is avoided in India.

(3.) Double appeals and partial appeals are bad. A double appeal obviously reduces the intermediate Appellate Judge to the position of a superfluity. His judgment decides nothing and involves mere waste of time, labor, and money. Moreover, if the First Appellate Court agrees with the Court of First Instance, one Court may come to overrule two, which is, to say the least, inconvenient.

Double and partial appeals are bad.

As for partial appeals, by which I mean an appeal upon law as distinguished from fact, which in Indian law are called special appeals, they are inconvenient on many accounts, but in particular because they involve a division between things which in practice cannot be divided, and which none but a technically educated mind can distinguish. It will appear hereafter how they are regarded by the Judges of High Court of Calcutta. There is, however, a broad general objection to all such proceedings, which I may state here. It is that by making the system of appeal intricate and lengthy, we make it unintelligible to those for whose benefit it is intended, and involve the Judges themselves in much needless intricacy of procedure. Many questions have arisen as to what may be done on revision, what on appeal, what on special appeal, whether an appeal can be brought after a case has been decided upon reference, and

Partial appeals.

so on. All this intricacy tends to confuse the administration of justice and render it unintelligible and unpopular.

None of the foregoing remarks apply to the reservation of points of law by one Court for the opinion of another. When a Court finds the facts, declares itself doubtful as to the law, and takes the opinion of a superior Court on the subject on which it doubts, it does in fact decide the matter contingently, and at all events settles the elements of the decision.

Reservation of points of law.

Double appeals are attended by one special inconvenience, that of defeating what, in this country, is by far the most important of the objects for which appeals exist—that of keeping a check on the Judges. If an inefficient Judge is subject to the supervision by way of appeal of a superior Court, it is obvious that the chance that the Appellate Judge may be himself overruled by a High Court diminishes the force of the check on the inferior Judge, whilst the chance that the High Court may confirm the decision of the Appellate Judge does not in any way increase the stringency of the Appellate Judge's control.

(4.) Appeals in this country are also open to the special objection of being the chief source of judicial decisions, the enormous bulk and rapid increase of which are, as I have tried to show, the most serious of the evils of the state of the law in this country already.

Appeals multiply cases. Evils of this.

(5.) Every system of appeal assumes the superiority of the Appellate Judge over the Judge of First Instance. This assumption fails in many cases in relation to Judges in India.

Great equality amongst Indian Judges a reason against multiplying appeals.

Nothing is added to a man's real efficiency by calling him a Sessions Judge or a High or Chief Court Judge instead of a Magistrate, and by paying him a higher salary. My own opinion is, that mere length of service, after a comparatively short time, adds nothing to a man's efficiency. Most people, after a few years, are quite as good Judges as they ever will come to be. It must also be remembered that, though promotion in India does not go merely by seniority, seniority has a great deal to do with the attainment of the higher grades of the service, especially in the judicial branch. After allowing for the vacancies caused by death, bad health, exceptional promotions and other causes, a man who conducts himself reasonably well may look forward with a very high degree of probability to becoming in his turn the Magistrate of a District and a Sessions Judge. A Judge in England is chosen from an open profession, because he has succeeded in it; and it may be said with something like certainty that a Judge of superior Court will be an abler man in important respects, and probably a better lawyer than a Judge of a County Court or a Police Magistrate.

In India matters are different. No doubt an experienced man will differ from a new-comer. A full-power Magistrate will be in every way superior to an Assistant or Deputy Magistrate; but a Sessions

Judge is simply a Magistrate grown rather older, and a High Court Civilian Judge stands in many cases in the same relation to a Sessions Judge, though the smallness of the number of High Court Judges, especially in the Presidencies of Madras and Bombay, is undoubtedly a guarantee for a higher level of ability amongst them than amongst the Sessions Judges. This consideration affords a strong reason for diminishing the numbers of the Calcutta Court. It is impossible not to connect the fact that the High Court of Calcutta has about three times as many Judges as the High Court of Madras with the fact that appeals from Madras to the Privy Council are of comparatively rare occurrence, whilst the Privy Council is choked with arrears from the High Court of Calcutta.

With regard to the other Courts, I cannot see what reason there is to suppose that the Appellate Judges (except the Magistrates to whom an appeal lies from their subordinates) should, as a rule, be abler men than the Judges from whom the appeal lies. Their superiority appears to me to be likely to be merely conventional resting, not upon any personal difference between the men, but upon a difference between the names of their offices. With regard to the District Judges as compared with the subordinate Judges and Munsifs, I need only refer to the observations already made to show that it would be altogether unsafe to assume that the Appellate Court is likely to be superior to the Court of First Instance. I cannot see, therefore, what general grounds there are for supposing that, when the Appellate and the inferior Courts differ, the Appellate Courts should be right and the inferior Courts wrong.

Advantages of appeal.

Such is the weak side of the system of appeals. There is, however, another side to the question which requires notice.

The system of appeals does undoubtedly afford some sort of security against the indifference and carelessness into which Judges altogether unchecked by public opinion and by the criticism of the Bar could hardly fail to fall. The fear of having judgment reversed on appeal, or by a superior Court in the exercise of the power of supervision, and the fear of the reproofs which may accompany the reversal of the decision, are the sanctions by which Indian Judges are kept up to their work. Moreover the right of appeal is the only security which can be devised for having cases in which a mistake has been made brought before the superior Court. A system of inspection and supervision, useful as it might be in its proper place and as subsidiary to appeals, would be open to the objection that the inspector could not be trusted to do his duty thoroughly, and would not find it very easy to obtain the materials for it. Inspection, moreover, is very apt to degenerate into a form.

Popularity of appeals.

I have also no doubt that appeals are popular in India, strange as it may appear to an Englishman. Many persons who have had long experience of the Native character tell me that Natives of all parts of India care, above all things, to be fully heard, to be able to say all that

they have to say about every part of their cases, that they care less for time than English people, and are less impressed with the advantages of promptitude and decision.

Conclusion.

For these reasons it is necessary to admit that something must be sacrificed on the side of energy and decisiveness for the purpose of securing an efficient check against the idleness or indifference of Judges, and of assuring the people at large that substantial justice is provided for them. Hence appeals as of right to a certain extent are a necessary evil. I think, however, that they should be diminished as much as possible, and in particular that double and special appeals should be replaced by power to the inferior Courts to state cases for the Courts above.

With these general remarks upon the subject of appeals, I now proceed to consider—

(1) the system of criminal procedure, and

(2) the system of civil procedure, with a view to the subject of judicial organization.

(1.)—*The system of Criminal Procedure.*

General features of the existing system of criminal procedure.

The system of criminal procedure which prevails at present throughout British India is constituted by Act XXV. of 1861 and Act VIII. of 1869. The Act of 1861 consisted of 445 sections, to which the Act of 1869 added 20 more. A Bill for the consolidation of these and some other Acts on the same subject is now before the Council, and will, I hope, be proceeded with in the winter.

Before entering upon any detailed criticism of the system, I may shortly re-call its leading features. It is modelled upon the English system, though with some adaptations and variations. Its principal steps are—(1) arrest by the police and inquiries incidental to arrest; (2) issue of summons or warrant by the Magistrate and inquiry subsidiary thereto; (3) procedure before the Magistrate, who may either try the accused himself or commit him to the Sessions or High Court; (4) procedure before the Court of Session; (5) appeals, reference, and revision by the High Court.

The Code of Criminal Procedure contains many other provisions which do not bear upon the present subject, and which are intended for the prevention or suppression of offences. Such are, the law as to the abatement of nuisances, the taking of recognizances for keeping the peace, and securities for good behaviour, and the making of orders for the maintenance of wives and children.

The parts of this scheme which appear to require notice on the present occasion are those which bear directly upon the duties of Magistrates and upon the system of appeal.

Preliminary inquiry and subsequent trial.

It is unnecessary to discuss the question whether the general scheme of procedure is good in itself. It is established and understood by the officers and the people, and there is no reason for debating its principles as if the matter were altogether open. Of the various objections to the system which I have seen, the one that seems to me to go deepest is raised by officers who inquire whether it is wise to try a man twice over,—once for the purpose of a preliminary enquiry, and once for the purpose of punishment. The Natives, Sir William Grey observes, can never understand why, when the Hakim has caught a thief, he should not punish him. Other officers refer to this part of the system of criminal procedure as an unwise introduction of English institutions into India. The criticism, when put broadly, is unjust. It is only in exceptional cases that criminals are committed to the Sessions. An immense majority of cases are tried by the Magistrates in a summary way. Cases of theft in particular, which form a majority of the serious criminal cases, are thus disposed of in the absence of special circumstances of aggravation.

It can hardly be seriously maintained that Magistrates ought to be empowered to inflict sentences of death or transportation for life in a summary way; but if they are not to do so, there must be a further enquiry, and the accused person must be detained till it can take place. I do not see, therefore, how the preliminary inquiry before Magistrates can be dispensed with in cases which involve serious punishment.

Provision as to taking evidence.

The first sections to which I shall refer are those (195—205) which prescribe the manner in which evidence is to be taken and judgment recorded. They form part of the system already noticed, which is completed by that part of the Act which relates to appeals, reference, and revision.

It is provided in the first place (sections 195—198) that the evidence of each witness shall be taken down in writing in the language in ordinary use in the District in which the Court is held by or in the presence and hearing and under the personal direction and superintendence of the Magistrate, and that it shall be signed by the Magistrate. If the Magistrate does not personally take down the evidence in writing, he is bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, which is to be written and signed by the Magistrate with his own hand and annexed to the record. The evidence is not to be taken down in question and answer, but commonly in the form of a narrative. The Magistrate is to sign a memorandum to the evidence of each witness that the evidence was read over to him in a language which he understood, and, if the fact is so, acknowledged by the witness to be correct. The examination of the accused person, it is enacted, "including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answer; and when the whole is made conformable to what he declares is the truth,

the examination shall be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person." It is further provided by the general rules that "every sentence or final order of a Criminal Court, together with the reasons for making or passing the same, shall be written in the vernacular language of the presiding officer," and "shall be incorporated in the record of the sentence or order."

Such are the materials which are provided for future criticism by the superior Courts of the proceedings of the inferior Courts. This criticism may be exercised in any one of three ways,—by appeal, by reference, or by revision.

Law of appeals, reference, and revision.

The law of appeals in criminal cases is contained in Chapter XXX., and is as follows (section 407):

No appeal lies from an acquittal, nor does any appeal lie from a conviction in which the sentence is passed by a Court of Session, or a Magistrate of a District, if the sentence does not exceed a month's imprisonment or Rupees 50 fine (No. 411).

In cases tried by a jury, no appeal lies as to matter of fact, but only as to matter of law (409).

In other cases appeal lie as follows: · Any person convicted on a trial held by an officer exercising powers less than those of a Magistrate may appeal to the Magistrate (section 41); any person convicted by a Magistrate may appeal to the Court of Session (section 409); and any person convicted by the Court of Session may appeal to the High Court (section 408). Petitions of appeal to the Sessions must be presented within thirty, and petitions of appeal to the High Court within sixty, days. The Appellate Court may, upon reading the petition and judgment appealed against, reject the appeal. If they do not see fit to do so after perusing the proceedings of the lower Court, and after hearing "the plaintiff" (which, I suppose, means the appellant) "or his counsel or agent, if they appear," they may alter or reverse the sentence or finding, but not so as to enhance any punishment. They may also direct further enquiry to be made or additional evidence to be taken "upon any point bearing upon the guilt or innocence of the appellant."

No power is given by the Code of Criminal Procedure for an inferior Court to state a case for the opinion of a superior Court, nor is there any power of special appeal.

Law of revision.

The system of revision is as follows:

By section 443 the High Court has power to make and issue general rules and the transmission of calendars and statements by the Judges of inferior Courts. This power, I believe, has been universally exercised in such a manner that the High Courts are kept aware of all that passes in the Sessions Courts.

By section 402 the High Court is authorised "upon a review of the abstract statement or calendar of prisoners punished without

reference" (*i. e.*, not capitally punished) to annul any sentence which could not lawfully be passed. If (section 403) it thinks that there has been error in the decision of the Court of Session on a point of law, or that a point of law should be considered, it "may call for the record or such portion thereof as it may deem necessary, together with a report of the Judge's direction to the jury, if the case have been tried by a jury; and, upon reviewing the depositions of the witnesses, the direction of the Judge, and the conviction, may determine any point of law arising out of the case, and thereupon pass such order as to the High Court shall seem right."

By section 404 the High Court may on the report of a Court of Session, or of a Magistrate, "or whenever it thinks fit," call for the record of any criminal trial, or of any other judicial proceeding, in which it shall appear that there has been error in a point of law, or that a point of law should be considered by the High Court, and may determine any point of law arising on the case, and pass such order as it sees fit.

By section 405 the High Court may call for and examine the record of any case tried by any Court of Sessions for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court. It may mitigate sentences, which appear too severe and reverse illegal sentences, or order new trials.

These powers apply to all Courts whatever.

Courts of Session and Magistrates may call for and examine the records of Courts immediately subordinate to them, and, if they regard the sentences of such Courts or such proceedings as illegal or irregular, they may refer them to the High Court, but may not themselves alter them.

Law of reference.

Reference takes place only in cases in which a Court of Session has passed sentence of death. All such sentences must be confirmed by two or more Judges of the High Court, who, if they like, may order "further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused person."

Such is the course of proceeding which has been established with a view to the superintendence and revision of the proceedings of the Criminal Courts.

The High Courts and the Chief Court of the Panjáb carefully examine all the proceedings of the Courts subordinate to them by the help of forms which all the Judges are required to fill up.

This system gives every person convicted a wide license of appeal against his sentence. I need add nothing to what I have already said on this subject, except that there is one peculiar and special anomaly about appeals in criminal cases. There is no power of appeal against an acquittal, so that the process of appeal is altogether one-sided.

Abuses which law as to recording evidence was meant to prevent.

The sections which compel every Judge of an inferior Court to record, or to superintend the recording, of all the evidence of all the

witnesses, and to authenticate it by his signature, were inserted, as I am informed, in order to guard against the practice which formerly prevailed, and which, as it would appear from several circulars of the High Court at Calcutta, and the Chief Court of the Panjáb, is not even yet altogether suppressed, of delegating to Native clerks or mohurrirs the task of taking the evidence of witnesses. I have heard that in former times as many as three or four witnesses would be under examination at once by different mohurrirs in various parts of the Court, whilst the Magistrate was occupied with other business, reading over, for instance, the evidence in some other case which had already been taken in this manner.* It is obvious that the effect of this would be to transform the mohurrirs into the real Judges of the case, which, of course, would be a mockery of justice. A mohurrir is a Native writer paid some Rupees 8 or Rupees 10 per month. Nothing, of course, could be worse than this, but the present law is not free from objection.

It attempts to secure an accurate report by the clerk by making the Judge answerable for the accuracy of what the clerk takes down, whilst the Judge has also to take down his own notes besides.

I do not pretend to say how far the imperfect acquaintance of English Judges with the Native languages may render it necessary to employ mohurrirs; but, unless this and similar difficulties make it practically impossible to do so, I should think that the Judge alone ought to take notes, and that his note should contain the substance of the witnesses' statement only. If the Judges cannot in practice be trusted to take notes, there may be no remedy for the present system; but the system is in itself clumsy and faulty. If the Judge is able to take a note himself, the mohurrir's

* In Shore's *Notes of Indian Affairs*, published in 1836, there is a curious passage describing the practice which then prevailed. Speaking of criminal trials, he says—"It rarely happens that the parties concerned are examined personally by the Magistrate. The police reports, prosecutors, prisoners, and witnesses are handed over to different Natives attached to the office, who sit down in an adjoining room, question them in Hindoostanee and take their depositions in Persian, after which the case is considered prepared, and it will be heard either the next day or some day after when the Judge-Magistrate is at leisure."

..........At the hearing—

"The Judge-Magistrate is occupied in the following manner: The prisoners are placed before him; the prosecutors and witnesses are successively pushed or dragged into the room; the Koran or bottle of dirty water (supposed to be that of the Ganges) is placed in their hands; and the depositions of the whole gabbled over as fast as possible in *Persian*."

.........."During the last few years a slight variation has been made in the above routine. In some Courts the parties are not often now taken into a different room to give their deposition. It is done in that in which the Magistrate sits; and, when brought up for hearing, the officer of the Court reads off the deposition in Hindoostanee. There is something in the *name* of being examined in their own language before the Judge-Magistrate; and such is the statement made to Government; but I must let my readers a little behind the scenes. The writers who take the depositions do so in the remotest corners of the room, and are desired to speak in as low a tone as possible, so as possible that they may not interrupt the Judge-Magistrate who is attending to other business; and when the case is brought up to be heard, the officer of the Court certainly uses Hindoostanee words as he reads on, but, as certainly, does not speak Hindoostanee,"......"but scrambles through it using the Persian idiom throughout, and merely substituting Hindoostanee for Persian words."—(*Shore's Notes*, I., 239-40.)

note is merely a reed on which an idle or unscrupulous Judge can lean. It is possible even that he may evade taking notes altogether, and fill in the evidence from the mohurrir's note if an appeal is brought. I have reason to believe that in one Province at least this practice is suspected to exist.

Several circulars, issued at various times by the High Court at Calcutta, seem to confirm this suggestion. Referring to the section (section 172) which requires the Judge to make a memorandum, the High Court says—

Circulars of Calcutta High Court on this subject.

"The Court look on a compliance with this provision as the only safeguard that the evidence is really taken *vivâ voce* before the Judge as required by law, and not by an irresponsible and incompetent mohurrir, according to the old and, they fear, still continuing practice. The Court hope that European officers generally act up to the law, but their impression is that most of the Native officers utterly disregard it. Nothing can be worse than the evidence taken by them.

"To see how far the Judge made a reliable and real memorandum of the substance of the evidence as it proceeded, the Court happened to ask for the notes of the evidence in a particular case decided by ————, Principal Sadr Amín of ————.* It was a case solely dependent on the evidence, in which there must have been gross and rank perjury and forgery on one side or the other, and in which they are necessarily compelled to rely almost entirely on the finding of the Judge who had the witnesses before him. The Principal Sadr Amín's original notes are a disgraceful farce. It strikes the Court that a form is made out by another hand, a mohurrir no doubt, and a word or two filled in afterwards by the Principal Sadr Amín by way of literal compliance with the law. The Court do not mean to say that this Principal Sadr Amín is singular in his conduct. They believe it is the common and ordinary practice to disregard entirely the rules prescribed by law for taking evidence. Certainly the depositions are seldom such as would be called evidence in any civilized Court of Justice in the world."

* The names are given in full, but, as the circular is dated seven years since, I leave them in blank.

Though this circular refers to civil cases, it illustrates the course of criminal justice equally well, as the provisions upon this point in each code are the same.

Provisions as to examination of accused person.

One provision, however, is peculiar to the Code of Criminal Procedure. The rules relating to the examination of the person accused, which provide that it must be taken down in question and answer, must, I should think, interfere with its effectiveness. Such an examination ought to be as searching a cross-examination as the person who examines can apply. I do not know how a witness could be effectively cross-examined if it were necessary to put all the questions in writing before asking them. Frequently a great number of

questions must be put, or the same question must be repeated in a variety of forms, before an answer can be obtained; and if all such questions were taken down in writing, the examination would become interminable, unless it was so much abridged as to be inefficient. In England the examinations of bankrupts are usually taken in the manner prescribed for the examination of the accused in section 205; but a short-hand writer is always employed for the purpose, and this would, of course, be out of the question in India.

Judges to give reasons for their judgments.

The provisions which compel every Judge to give his reasons for his judgment, and to write them out, would be open to great objection if it were not for the very peculiar position of the Indian Judges and the necessity for maintaining an unusually stringent control over them. In many cases it is very difficult to give the reasons of a judgment in such a manner as to satisfy those for whose supposed benefit they are given. Still a Judge may reasonably be expected to learn to do so if an important object is to be gained by the process; and, as control and superintendence by the Courts is the only available security in this country for the proper discharge of their duties by the Judges, it is obviously necessary to provide the inferior Courts with the means of exercising that control and superintendence in an effective way, and this object is no doubt attained by requiring Judges to give their reasons in writing. The diminution of promptitude and efficiency which results from the rule is part of the price which has to be paid for an administration of justice conducted under the conditions already stated.

Finality of decisions of juries as to facts.

There is one inconsistency in the Code of Criminal Procedure in relation to this matter. Juries give no reasons, and their decisions as to matters of fact are final. A Magistrate or Sessions Judge may surely be presumed to be at least as intelligent and honest as an average juryman. Why then call upon him for guarantees which are never required of a juryman? This appears to me to raise the question of the wisdom of the introduction of trial by jury into certain Districts in India. The experiment has now been for ten years under trial, and the Local Governments have been called upon to report as to its result. Whatever that result may be, it seems to be inconsistent to enact that the decision of a jury, perhaps only by a majority, shall be, and that the decision of a Judge shall not be, conclusive as to matters of fact. I can suggest no reason at all why they should be more trustworthy or more likely to arrive at a just conclusion, and there can be no reason for giving their verdict an importance which is withheld from the decision of a Judge.

Judge's report of summing up.

The practice of requiring the Judge to write out his summing up after he has delivered it, seems to be less defensible than the practice of requiring him to give written reasons for his judgment. I can hardly imagine how a man is to sum up well and effectually unless he does so with considerable freedom, and this can scarcely be the case when he must report to a superior authority the substance of what he said. I should doubt, too, whether the summing up would be very effective when it has to be done

in a foreign language by a man who has had no practice in public speaking. It is impossible, indeed, to read the Code of Criminal Procedure without seeing that such of its provisions as relate to trial by jury are altogether exceptional and out of harmony with the other parts of the Code.

Manner in which High Courts exercise their duty of supervision.

So far with respect to the means provided for enabling the High Courts to exercise the powers of revision and superintendence conferred upon them. I turn now to the manner in which these functions are exercised. Whether the course taken be appeal, reference or revision, the proceedings consisting of the notes of the evidence, the judgment of the Court, are forwarded to the superior Court, which, as a general rule, decides entirely upon written depositions. The law, no doubt, authorizes Appellate Courts to direct further inquiries, new trials, &c.; but, in practice, this is seldom done, and when it is not, the process of appeal is simply this: The Court reads the record and the Judge's reasons, hears the advocates, if any, and decides according to the impression which these documents make upon it. This may be the best mode of hearing appeals which is practicable, but it is very unsatisfactory. Whatever may be the intrinsic superiority of the Appellate Courts over the Courts of First Instance (and this in many cases is very doubtful), they certainly have not equally good materials for their judgment, for they judge upon hearsay evidence, namely, the Judge's report of what the witnesses said.

Mistakes of inferior Courts should be avoided by system of revision, but first impression likely to be most accurate.

It may, however, be asked whether the inferior tribunals are not likely to make many mistakes, and whether there should not be some means of correcting them. To this I should reply that the use of appeals is rather to keep the subordinate Judges up to their work than to correct their mistakes. As a rule, the chance that the first decision will be right is better than the chance that any subsequent decision will be right, particularly in criminal proceedings; still, in order to provide proper security that the Judges will do their duty, it is, I think, necessary to retain substantially the existing system of appeal and superintendence, although it is desirable to use every effort to strengthen the Courts of First Instance with a view to the future diminution of the intricacy and want of vigor of the whole system.

I will now proceed to make some special observations on the existing system of reference and revision.

Reference. Character of process illustrated.

Reference is only a particular case of revision, and applies to the case of sentences of death. Such sentences cannot be carried out until they have been confirmed by the High Court. This appears natural, but it is by no means free from inconvenience, as it can hardly fail to produce many of the evils of divided responsibility.

A case lately occurred in which a Sessions Judge inferred from certain circumstances that a particular person had been accessory before the

fact to a murder. The significance of the circumstances depended upon the local habits of the District in which the crime occurred. A High Court Judge, to whom the matter was referred, observed—"What am I to do? I know nothing of the place or the people except what the Sessions Judge tells me, and I can, therefore, draw no inference from the facts which he states. Am I and my colleague to confirm his finding in reliance upon him, or are we to reverse it, because we cannot say that the case is made out to our satisfaction? If we confirm his judgment, he is the real superior Court, and we are a superfluity. If we reverse it, we are very likely saving the life of a man who deserves to be hung, and whose escape would do an immense amount of mischief and depress the authority of the law over the whole of a turbulent District."

In all cases, under the system of reference, the Sessions Judge must feel that, if he makes a mistake, there is some one to set him right or to take the responsibility off his shoulders by sharing his error. The High Court Judges feel that, if they make a mistake, it is the fault of the Sessions Judge. The result is, that the real responsibility rests on no one.

Revision.

The general object of revision is to discover and ratify any mistakes which may have been made in criminal trials on points of law. If, as ought to be the case, it is confined to cases in which substantial injustice has been done, I think this is a highly useful and indeed a necessary power. I do not, however, see why it should be confined to cases in which the interests of the prisoner have been prejudiced. It might well be extended to cases in which the public has been injured by a wrong acquittal or an over-lenient sentence.

Superintendence.

The system of superintendence differs from revision, reference and appeal in its extreme generality. It consists in the power exercised by the High Courts of administering reproofs to subordinate Judges, calling for returns from them upon all subjects, issuing book circulars, framing, in some cases, rules of procedure, and, in short, in treating the inferior Judges altogether on the footing of official inferiors. The general subject is one on which I do not feel competent to offer any observations. Under the very peculiar circumstances of this country it is no doubt absolutely necessary to keep up a sharp and effective system of discipline over individual Judges, and the power of laying down rules of practice is obviously one which must, in some shape or other, be possessed by every superior Court. There seems, however, to be much room for improvement and simplification in the existing forms and orders which have been issued by some of the Courts.

Issue of orders, book circulars and forms.

I have carefully examined the circular orders and rules of procedure published by the High Court of Calcutta and the Chief Court of the Panjáb. The former are collected in a volume published by the permission of the Court by Mr. Field; the latter are

collected in a recent edition of the Code of Criminal Procedure by Messrs. Cunningham and Newbery.

Mr. Field's account of the circulars of the High Court of Calcutta.

Mr. Field's preface contains the following passage:

"By virtue of the power vested in the High Court, these general rules and circular orders which form the contents of this volume have been made and issued. There is a vast mass of circular orders passed by the old Sadr Court, of which many have become wholly obsolete, many are wholly inapplicable to the present state of things, having been suggested by views of expediency which no longer exist; while many more must be considered as rescinded with those acts or regulations under the authority of which they were issued. To select out of this mass all that must be held at present in force, and to put it in a collated form for facility of reference, is a task which I had once proposed to myself. I found, however, on making the attempt that I could not satisfactorily perform it, as the work of selection involved the omission of much that could only be omitted with safety on the authority of the Court. This authority could be granted only after the Judges had given the subject their deliberate consideration, which could not conveniently be done at the present time." The effect of this is, that no one knows what rules are in force and what are not; that all that is known is the existence of "a vast mass" of them which the Judges have no time to examine. This is not a creditable state of things.

Confusion of executive and judicial relations.

The system is open to the objection that it tends to confound together the executive and judicial relations between the parties concerned. The circular orders relate to all sorts of subjects. In some instances they lay down rules upon matters in which a rule is clearly needed, as, for instance, upon the scale of costs to be allowed to parties, and the scale of expenses which are to be allowed to witnesses. In other cases they volunteer beforehand explanations upon particular provisions of the Code which the Court regards as ambiguous, which explanations have practically the force of judicial expositions of the law. In others, they call the attention of the subordinate Judges to faults in procedure, or otherwise, which they regard as common. For instance, several circulars rebuke the illegal mode of taking evidence to which I have referred, and others direct the Judges to write their notes legibly. Lastly, there is a large class of circulars which directs the manner in which the Magistrates are to make out many of their returns, &c.;

Rules as to returns.

some of these seem to me to be so contrived as to inflict an immense amount of needless trouble on Magistrates. For instance, a circular of the late Judicial Commissioner of the Panjáb directs Committing Magistrates to make up what it calls a calendar of the prisoners committed for trial to the Commissioners' Courts in a form so constructed that it must give nearly as much trouble to fill it up as to try the case. It contains eight columns under

which the evidence for the prosecution is to be marshalled, distinguishing witnesses to the fact, to the apprehension, to the inquest report, to the finding or identity of property or body, to character and other evidence, specifying what evidence each witness gives. To this is appended an 'abstract of the examination and grounds and date of commitment for trial,' which contains a written history of the case, showing minutely over again what each witness proves, and how the different parts of the evidence are connected together. I can see no conceivable use in this, except to spare trouble to the Commissioner, who acts as Sessions Judge in trying the case. If he tries it as he ought *de novo*, and upon the oral evidence of the witnesses, the form would not save him anything like so much trouble as its preparation would give to the Committing Magistrate.

Illustration of the confusion thus caused.

Some of the circulars mix up together explanation, admonition, and rules of procedure in a manner which leads to a great deal of confusion. Upon the whole, it seems highly desirable that the executive and judicial control over the Judges should be kept distinct. Supplementary rules of procedure are, of course, at times absolutely necessary, but they should be published as rules, and, like all other laws, should be merely imperative and should not be mixed up with explanation, advice, and admonition. On the other hand, the decisions of Courts should be purely judicial, and, except in very rare cases, should not touch upon personal questions.

Power to call for returns.

In the third place, the power of continually putting new duties upon Magistrates and Sessions Judges by calling for new returns and requiring new forms to be filled up, ought, I think, to be put under very close restrictions. In the work to which I have referred, there are printed the titles of no less than seventeen different registers in the criminal department and twelve registers common to the criminal and civil departments. It is stated in one column that these registers are to be kept by various subordinate officers attached to the Court, such as the Departmental Clerk, the Reader of the Court, the Head Reader or Superintendent in the Chief Court, the Nazir and the Record-keeper. Some of them are obviously necessary, as, for instance, those which relate to matters of account, but the total number appears to me exceedingly large. I do not believe that the proceedings of any Court in England are registered with anything like this amount of completeness and elaboration. I do not pretend to offer a distinct opinion upon the value of each particular register, or to say which really do, and which do not, act as valuable checks upon the Magistrates and Judges. I am well aware of the great utility of such checks in many cases, but there is in all such checks a danger of excess which should be guarded against by a careful enquiry into the whole subject of judicial forms and registers.

Objects of forms.

The forms are intended for two distinct purposes,—the collection of statistical information, and the maintenance of a check over the proceedings of the Judges. It appears to me that each object would

be most effectually obtained by relieving the Magistrate of all responsibility as to the keeping of the records and making out of the forms and returns. This, I am informed, is a most laborious process, requiring a great deal of time and attention, though, of course, the work itself is done by subordinates. An Inspector of Records would probably do it much better, and the Magistrate's time might be much more advantageously employed. It is obvious that, in so far as the collection of statistics is the object in view, the Magistrate is not the proper officer to employ on such a purpose. In so far as the returns are meant as a check on the Magistrate, the less he has to do with their preparation the better. The number of circulars which the High Court of Calcutta has issued about the meaning of particular headings in given returns, affords a strong indication of the fact that they are more minute than they really need be.

Danger of Magistrates working with an eye to the returns.

I must add one special remark on this subject. The Judges, and in particular the Native Judges, very naturally, and by no means incorrectly, suppose that their promotion depends upon what appears in the returns of their work. The effect of this is, that they are under a temptation to do their work with an eye to the returns, arranging and disposing of the business in such a way as to make the returns look well.

The question whether the superintendence of the Judges in the way of discipline should not be separated from the mere legal function of appeal in its various shapes, has been frequently considered. The High Courts for the most part wish to retain the power of discipline. The Local Governments wish to relieve them of it. Whatever my opinion may be worth, I think that the Local Governments are right. It seems to me highly desirable to draw as broad a line as possible between purely judicial and executive duties. The Judges of the High Courts should simply decide cases. If they notice irregularities or inefficiency on the part of a Judge, they might refer the matter to a special authority. A Judicial Commissioner might do all the work in the way of discipline by the High Courts, and a good deal of inspection besides; and if one of the High Court Judges were invested with these functions, no additional expense would be caused.

(2.)—*Civil Procedure.*

I pass now to the system of civil procedure, which differs in many respects from that of criminal procedure, though in many other particulars they are closely analogous. In considering this subject, I shall not enter upon the great question of the best system of pleading, partly on account of its magnitude and difficulty, but principally because, though it has some bearing on the state of our judicial organization, the connection between the two things is comparatively slight. I may, however, observe that the Code stands urgently in need of being re-drawn. Upwards of 2,500 decisions have been given on different parts of it, and six Acts have been passed to amend it. A re-draft of it was made some years since, but the Bill was not proceeded with in consequence of orders from England. The only points to which I need refer

are the system of trial and of appeal, and the organization of the Courts.

With respect to the system of trial, nothing so much surprises an English reader of the Code of Civil Procedure as the absence of any specific directions whatever for the hearing. This is in England the emphatic and striking, and, as a rule, the decisive part of the procedure. Every one understands that, when a cause is once called on at the Assizes or in Westminster Hall, it must be there and then heard out and decided, rare exceptions excepted. It is, moreover, well understood that it is the business of the parties to be ready, and to have their witnesses ready; and that, if they neglect to do so, there will be judgment against them, which judgment it will be exceedingly difficult to set aside.

The Code of Civil Procedure leaves all this entirely out. The sections which prescribe the circumstances under which the Court may decide at the first hearing are followed by a very wide provision (146) as to adjournments, the effect of which is that cases may be, and often* are, adjourned for an indefinite time, a witness or two being heard to-day, and two or three more some weeks afterwards. This dilatory, ineffectual way of doing business is, I am told, peculiarly attractive to the weaknesses of the Natives, and the High Court has done its best to put a stop to it by repeatedly issuing rules of practice which direct the Judges to try cases out at once. The advantages of this are obvious, and, I think, that the Code should be amended by explicit and stringent provisions, making this course the general and legal one.

* See Mr. Justice Phear's remarks on this, p. 80 (below).

The general law as to appeals depends at present upon Act XXIII. of 1864, Section 23, and the Charter of 1862. This section provides that appeals shall lie from the decrees of the Courts of Original Jurisdiction to the Courts authorized to hear appeals. If the appeal lies to the High Courts, it must be heard and determined by a Court of two or more Judges. If two such Judges differ as to a matter of fact, and one agrees with the Lower Court, the case is to be determined accordingly. If they differ on a point of law, they are to state the difference. The point is to be re-argued before one or more of the other High Court Judges, and is finally to be determined according to the opinion of the majority.

The Appellate Court can, if it pleases, hear additional evidence, or direct the trial of supplementary issues.

An appeal from the decision of any Court inferior to the High Court will lie to the High Court from all decisions passed in regular appeal by Subordinate Courts on the ground of the decision being contrary to law. These are called special appeals.

Lastly, any person considering himself aggrieved by any decision of any Court of original jurisdiction, may apply within ninety days for a review of judgment, either upon the ground of the discovery of new evidence, "or from any other good and sufficient reason."

Course of appeal,

The actual course of appeal differs in the different Provinces. In Bengal and the North-Western Provinces the course is at present as follows:

in Bengal and North-Western Provinces;

There are four kinds of Judges,—Munsifs, Subordinate Judges, District Judges, and High Court Judges. Munsifs may try cases up to Rupees 1,000, and an appeal lies from their decision to the District Judge. Subordinate Judges may try (1) cases exceeding Rupees 1,000, (2) cases up to Rupees 1,000 if referred to them by the District Judge. An appeal lies from their decisions to the District Judge if the value of the case does not exceed Rupees 5,000, and, in all other cases, direct to the High Court.

The District Judges have an original jurisdiction unlimited in amount and an important miscellaneous civil jurisdiction, as, for instance, under the Succession Act, under the Divorce Act, and the like. An appeal lies from their decisions to the High Court.

in Bombay;

In Bombay there are five kinds of Judges, *viz.*, Subordinate Judges of two classes, Assistant Judges, Joint Judges, District Judges, and High Court Judges.

Subordinate Judges of the 2nd class have jurisdiction in all civil suits up to Rupees 5,000. There is an appeal to the District Judge.

Subordinate Judges of the 1st class have jurisdiction in "all original suits and proceedings of a civil nature," with an appeal to the District Judge, or, if the case exceeds Rupees 5,000, to the High Court.

District Judges are "the principal courts of original civil jurisdiction in the District," and are also Courts of appeal from all decrees and orders passed by Subordinate Courts.

Joint Judges are Judges having concurrent jurisdiction with District Judges, but doing such civil business only as they receive from the District Judges or the High Courts.

Assistant Judges are subordinate to the District Judges, and may try any cases referred to them by the District Judges not exceeding Rupees 10,000, and not being in the nature of appeals. The appeal lies to the District Judge in cases under Rupees 5,000, and, in cases exceeding that amount, to the High Court.

in Madras;

In Madras the Munsifs have at present original jurisdiction up to Rupees 1,000, which it is proposed by a Bill, now before the Council, to raise to Rupees 2,500. An appeal lies to the District Judge, who, however, may refer the case for hearing to the Principal Sadr Amín.

The Principal Sadr Amíns have original jurisdiction up to Rupees 10,000. An appeal lies in all cases to the District Judge.

The District Judges have unlimited civil jurisdiction with an appeal to the High Court.

in Non-Regulation Provinces.

I have already stated in a tabular form the jurisdiction of the Panjáb Civil Courts. They may serve as a model of the Courts of the Non-Regulation Provinces, though there are variations of detail amongst them.

Small Cause Courts.

In every part of India there are also Small Cause Courts which decide cases up to Rupees 500 without appeal, though they have power to state cases for the superior Courts.

Distinction between appellate jurisdiction in civil and criminal cases.

The general remarks which I have made as to appeals in criminal cases apply for the most part also to appeals in civil cases, but there are several distinctions between the two. In the first place the persons by whom civil judgeships are held stand in a somewhat different relation to each other from those in which the criminal Judges stand. The Munsifs, Subordinate Judges, and Principal Sadr Amíns are for the most part Natives.

District Judges and Native Judges.

The District Judges are covenanted civilians, and 21 out of 56 Small Cause Court Judges are Europeans. No special qualification is required of them, and I believe that very few of them are barristers or attorneys, except in the Presidency Towns, and that still fewer are covenanted civilians.

Their relative efficiency. Education of Native Judges.

In the earlier part of this Minute I have given a full account of the controversy which has long been in progress about the training of the District Judges and their fitness for the posts which they hold, and it appears to me that that evidence clearly shews that it cannot, by any means, be affirmed that an appeal from a Subordinate to a District Judge is always or even usually an appeal from a worse to a better lawyer—the Subordinate Judges and Munsifs are more and more coming to be men who have received a regular legal education at one of the three Presidencies. The Bombay Courts' Act provides that no one shall be appointed a Subordinate Judge unless he be a subject of the Queen, who has practised five years as an advocate of a High Court in India, or as a vakíl in the High Court at Bombay, or who has qualified for the duties of a Subordinate Judge according to such tests as may, for the time being, be prescribed by such High Court, or who has taken the degree of Bachelor of Laws at the Bombay University. I believe that similar provisions are in force elsewhere.

Inferior Civil Courts better instructed than Appellate Courts.

Apart from the question of education, appeals in civil cases are appeals from a Native, who hears and sees the witnesses, to a foreigner who reads or has read to him a written account of what the witnesses say. How can it possibly be denied that such an appeal lies from a better to a less well-instructed tribunal? It may be said that the District Judges are, and that the Native Judges are not, above all suspicion of corruption. I have no reason to doubt that the European Judges in India are to the full as upright, and as generally believed to be upright, as

English Judges in England, and I fear it is true that this is not always the case with the Native Judges, but it may be observed that, if the Natives, as a whole, are too corrupt to be Judges, they are too corrupt to be Munsifs and Principal Sadr Amíns. The objection, in fact, proves too much, for it proves that there ought to be no Native Judges at all, which is absurd. In point of fact, almost all the litigation of the country begins at least before Native Judges, for the number of original civil suits which are tried before the District Judges is small, and the original jurisdiction of the High Courts is, with slight exceptions, confined to the Presidency Towns.

Corruptibility of Native Judges.

The following Table shows the importance of the Native Civil Judges. It gives the number of District Judges, Munsifs, Subordinate Judges, or Principal Sadr Amíns, and Small Cause Court Judges in the Regulation Provinces, distinguishing Natives from Europeans. A few of the Bombay Subordinate Judges are Europeans. Under the title of Subordinate Judges are included Principal Sadr Amíns in Madras and Bombay, and under the title of District Judges in Bombay, Assistant Judges are included. The Native District Judge at Bombay is an assistant of the third grade:

Proportion of Native to European Judges.

	District Judges.		Munsifs.		Subordinate Judges.		Small Cause Court Judges.	
	Europeans.	Natives.	Europeans.	Natives.	Europeans.	Natives.	Europeans.	Natives.
Bengal … …	30	…	2	184	…	…	9	32
North-Western Provinces …	19	…	…	68	1	16	2	1
Madras … …	21	…	10	100	2	10	10	1
Bombay … …	23	1	…	70	…	11	…	…
Total …	93	1	12	422	3	37	21	34

The result is that, out of 528 Judges of Courts of First Instance in the Regulation Provinces, 493 are Natives and 35 Europeans. I exclude the 93 District Judges, of whom 92 are Europeans, because their principal business is appellate, and I also exclude the Non-Regulation Provinces, because their Courts are organized on a different principle.

Substantially, then, it may be said that all the litigation, except what takes place in less than half of the Small Cause Courts, begins before Natives.

My personal opinion on the questions raised as to the integrity of Native Judges is, for obvious reasons, worthless. I have, indeed, no opinion, for I have no materials on which one could be founded. All that I positively know is, that many persons of experience have told me that, whether they actually are corrupt or not, the Native Judges are sometimes suspected of corruption. But I have also heard it affirmed on all hands and in the strongest terms that these suspicions apply rather to men who were appointed before the present system of university education had been established, than to the younger generation, and that the younger Native Judges are both morally and intellectually far superior to their predecessors.

Corruptibility of Native Judges assumed only for the sake of argument.

Be this how it may, the question as to the degree of corruption that may exist amongst the Native Judges is totally irrelevant to the question how our judicial system should be organized. Be it greater or less, it must stand as a deduction to be made from the total utility of the whole system, whether the system is complicated or simple.

The High Courts in their present form were established by 24 & 25 Vic., Cap. 104. They are the successors of the old Supreme Courts, which, in the case of Calcutta, re-placed the Mayor's Court, and, in the case of Madras and Bombay, the Recorders' Courts, which had superseded the Mayors' Courts.* These Courts were originally established in order to administer justice within the limits of the Presidency Towns, where a considerable European community was established, but they were not intended to have any jurisdiction over the country at large. Indeed, when they were first established, the British dominions hardly extended beyond the limits of the Presidencies.

The High Courts.

When the Supreme Court of Fort William was established in 1774, it was no doubt intended to act more or less as a check upon the

* The following dates may be convenient for reference :
About—
24th September 1726, Mayor's Court established in Madras. Similar Courts were established about the same time at Fort William and Bombay.
8th January 1753, Charter to Madras, altering the jurisdiction of the Court. Similar Charters were granted about the same time to Fort William and Bombay.
26th March 1774, Charter to Supreme Court of Fort William. Mayor's Court abolished.
20th February 1798, Recorders' Courts established by Charter at Madras and Bombay.
26th December 1800, Charter to Supreme Court at Madras.
8th December 1823, Charter to Supreme Court at Bombay.
14th May 1862, Charter to High Court of Bengal.
26th June 1862, Charters to High Courts at Madras and Bombay.
28th December 1855, new Charters to High Courts of Bengal, Madras, and Bombay.
17th March 1866, Charter to High Court in the North-Western Provinces. This Court was first established at Agra, but was afterwards removed to Allahabad.
(Broughton's Code of Civil Procedure, 347 *seq.*)

Government. The manner in which it exercised its powers, and the scandals and confusion which followed, are well known. Similar consequences followed in the case of the High Court at Bombay, and down to the time when the old Supreme Courts were superseded by the High Courts, the feeling that there was more or less of an opposition between the Supreme Courts as the representatives of the Crown and of English law, and the Company's Courts and officers from the Governor General and his Council downwards, who were supposed to represent a different order of ideas, cannot be said to have been extinct. This state of feeling was no doubt favored and increased by the circumstance that the Supreme Courts had nothing to do with the ordinary administration of justice in the mofussil. The course of appeal lay from the inferior Judges to the Sadr Dewani Adálat or Sadr Nizamat Adálat, according as the case was civil or criminal, and these Courts were entirely independent of the Supreme Courts.

Original object of High Courts to act as check on Government.

The Supreme Courts had exclusive criminal jurisdiction over European British subjects, and had also powers of considerable extent and importance, though somewhat vague in their character, over the whole empire. Some of these powers appear to have been transmitted to the High Court. In a recent case of importance the High Court held that they had power to issue a writ of *Habeas Corpus* into the mofussil to bring up the body of a Native who was supposed to be illegally confined. The original Act invested the Supreme Court with the powers of the Court of Queen's Bench, and it is needless to say that these are very extensive and not very well defined.

May have been good policy formerly.

The establishment of Courts of this sort as checks upon the Government was probably necessary at the time when it took place. The legal position of British India in the days of Warren Hastings and his immediate successors was altogether unexampled. An English Trading Company had acquired an empire to which English law was totally inapplicable, and which they held by a title so strange that it was impossible to give any distinct account of it. Between the Emperors of Delhi on the one side and the Crown of England on the other, they occupied a position altogether anomalous and unprecedented. Moreover, their remoteness from England and the deep and conscious ignorance of the English people upon the whole subject, made it still more difficult than it would otherwise have been to attempt anything in the nature of direct legislation. On the other hand, it would have been practically impossible to leave the Indian officials in the position of irresponsible despots. Under these circumstances it was probably the best course to establish a Court presided over by English lawyers and invested with vague general powers, which would be exercised in the spirit of English law. As the general state of affairs became more settled, and specially when the Government of the country was transferred from the Company to the Crown, it became natural to re-constitute these Courts, and to make them the heads of the judicial system of the

country, instead of continuing them in the character of checks upon the Government. The present High Courts were constituted with this view by amalgamating the old Supreme Courts with the old Sadr Nizamat and Sadr Dewani Adálats. They retain many of their general powers. Ten years have passed since the High Courts' Act became law, and nine years since the date of the Charters. This period would be short in England. It has been marked by immense changes in India in every part of the administration of the country, and the changes in the law have amounted almost to a revolution. As I have already shown, British India now possesses something much more nearly approaching to a Code than England or any other part of the British Empire. Nearly every Act of much importance which goes to make up that Code has been passed since 1858, or is now in the course of being passed.

Arrangements of 1861.

In the year 1861 the arrangements consequent on the transfer of the Government to the Crown were only just completed. The years immediately preceding had been disturbed by the greatest and most stormy crisis through which the empire has ever passed, and these again had been preceded by many years of annexation and war, during which little legislation of a permanent or general character took place. In short, British India has made greater progress towards the condition of a single homogeneous empire governed by a single homogeneous system of law in the last ten years than it had made in the whole of its previous history. I think that the time has come to give practical recognition to this fact by moulding its judicial institutions accordingly. When the law of the mofussil was vague, and was administered in a very irregular way by men who did not affect to be lawyers, when the powers of the Government were even more indeterminate than the laws which they administered, it was not unnatural to suppose that Courts of law, constituted on English principles, would set a good example, introduce English law and English habits of legal reasoning, and act as a branch of the legislature by deciding cases as they arose, besides constituting a useful check upon the possible despotic tendencies of the Government. I think that the time for this has now gone by, that we may hope, by taking proper measures, that, as time goes on, men perfectly competent to administer it will be found in the ranks of the Civil Service, and amongst English and Native lawyers practising and resident in India; and that the High Courts may take their proper places as the heads of the general system of the administration of justice, and may cease to be specially connected with the Presidency Towns—a connection which is purely artificial and, I think, objectionable on a variety of grounds. As English law has been introduced into the Presidencies, and as a considerable European population is resident there, it is no doubt right that justice should be administered to them by English Courts; but why the Judges of those Courts should be also members of the High Court which superintends the whole administration of justice throughout the Provinces, I do not know.

Recent changes.

Suggestion. Local Courts for Presidency Towns.

I think that the natural course would be to provide separately for the two objects of the administration of justice in the Presidencies and the general superintendence of justice in Bengal, Madras, and Bombay. Of Allahabad I do not speak, because the original jurisdiction of the Court there is of little practical importance. This may appear at first sight to be equivalent to recommending a return to the policy abandoned in 1861 of separate Supreme and Sadr Courts. There is a superficial resemblance, but the policy would, in truth, be the converse of the policy of 1861, or rather its completion. In 1861 the first great step was taken towards the fusion of English and Anglo-Indian law into a single system. I would complete that fusion by treating the Courts of the Presidency Towns as what they really are, and ought to be, exceptional institutions for an exceptional population. The Supreme Courts, as their names imply, were far more than mere local Courts of Justice. They were regarded as being counterpoises to the Executive Government. What I should now propose would be to give up the notion of checking one part of the government by another, and of keeping up a continuous stream of English lawyers into India, as if Indian law and lawyers were of necessity their inferiors. I would make no violent change, and in name no change at all, except that local Courts should be constituted for the Presidency Towns, the Judges of which should be barristers.

Converse of policy of 1861.

These Courts should have no jurisdiction at all out of the Presidency Towns, except admiralty jurisdiction. The High Courts would be mere Courts of appeal, but they should not be confined, as the Sadr Courts were, to the civilians, but should be open to civilians, barristers, and pleaders indiscriminately.

Reasons for this.

The object of this change would be to make the whole administration of justice in India, as far as possible, complete in itself, with its own system of law and its own Judges trained under that system. The effect of putting it to so great an extent, as is the case at present, under the superintendence of English lawyers imported into the country at what an Anglo-Indian would consider a late period of life, cannot, I think, be good. If it is desired that the study and practice of the law should really flourish in India, the highest posts in it should be open in practice, as well as in theory, to those who practise the profession in India. Indian law and the traditions and habits of Indian Judges are presumably better suited for India than English law and English Judges, to whom and to which an artificial and unnatural importance is given by the present arrangement.

Criminal jurisdiction over Europeans.

With regard to the original criminal jurisdiction of the High Courts over European British subjects, it might, if thought desirable, be continued to the Presidency Courts; but it seems to me that it ought to be

reduced within the very narrowest limits, if it is to be maintained at all. I can understand the reasons why a European British subject should not be tried by a Native Magistrate, but I cannot understand why he should be supposed to carry, wherever he goes, a right to some sort of trial by jury. The value of this institution seems to me to depend entirely upon a combination of circumstances which could hardly be found out of England, and which cannot be found in India out of the Presidency Towns, where there is a considerable European population. A jury, for instance, at Lahore, is a mere caricature of an English jury, and is very frequently, as I have had reason to know by my own experience officially and otherwise, an instrument of injustice. The European population is so small that, in order to get a jury, you must either stop public business or take the jurymen from a small knot of people, every one of whom is probably well acquainted with the prisoner and has talked over every circumstance in his case for weeks.

With these general observations on the position of the High Courts, I proceed to consider their condition, and, in particular, that of the High Court of Calcutta as described by the Judges themselves.

Constitution of High Courts as to appeal.

The powers of the High Courts are regulated partly by Acts of Parliament, and charters issued under powers contained in them, and partly by the Acts of the Indian Legislature. The Courts are empowered to "provide by their own rules for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the original or appellate jurisdiction vested in" them, as they may think fit. The Chief Justice of each High Court is from time to time to determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts.

Appeals how to be heard.

The Act which amends the Code of Civil Procedure (XXIII. of 1861, section 23) provides that when an appeal lies to the High Court, it shall be heard and determined by a Court consisting of two or more Judges of that Court; that if they differ on a point of fact, and one of them agrees with the Court below, the case shall be determined accordingly; and that if they differ on a point of law, the case shall be re-argued before another Judge, or other Judges, and be decided according to the views of the majority.

Practice.

The common practice of the High Courts is, that the Barrister-Judges try, in the first instance, causes which arise within their original jurisdiction, and that the Judges not required for this purpose are formed into division benches of two, to each of which (in Calcutta at least) the appeals from certain Districts are entrusted.

Answers of Calcutta Judges to Government of India as to expense of High Court.

In answer to a circular from the Government of India, enquiring whether it would not be possible to reduce the expense of the High Court Establishment, several of the High Court Judges have lately sent in communications which bear upon the

whole subject of appeal and the organization of the High Court. The substance of their respective communications is as follows :

Sir B. Peacock proposes to abolish special appeals.

The late Chief Justice, Sir Barnes Peacock, proposed to relieve the Court by abolishing special appeals. Out of 3,047 special appeals preferred in 1869, the value in cash was as follows :

			Rs.		Rs.
147	cases under	...	5		
175	„ above	...	5	and under	10
753	„ „	...	10	„	50
468	„ „	...	50	„	100
403	„ „	...	100	„	500
538	„ „	...	250	„	250
266	„ „	...	500	„	1,000
297	„ „	...	1,000		

He observes—"These figures show 1,543 under Rupees 100, 941 above Rupees 100 and under Rupees 500, or a total of 2,484 under Rupees 500, 266 above Rupees 500 and under Rupees 1,000, or a total of 2,750 under Rupees 1,000."

Sir Barnes Peacock adds—"I have not been able to make any accurate calculation of the amount of public money which each special appeal costs; but I feel confident that, taking an average, the cost of each special appeal, including salaries of Judges and of various members of the establishment employed on the case from first to last, cannot be estimated at less than from Rupees 100 to Rupees 120, involving a cost to Government, as regards special appeals, of upwards of three lakhs a year.

"It must be evident that in a very large number of cases, I would say as regards the whole of the 1,543 special appeals under the value of Rupees 100 each, it would be cheaper to Government to pay the full amount of the appellant's demand with the costs of both parties, and to give each a bonus for terminating the litigation, than to support an establishment, such as the High Court, for deciding such differences.

"The Lower Court may come to a wrong decision upon the facts as well as upon the law of a case. There is no sound principle upon which an establishment ought to be kept up for correcting errors in law when errors as to the facts remain unredressed."

Mr. Justice Loch would restrict special appeals.

Mr. Justice Loch says—"So long as the present system of appeals continues, the work of the Court is not likely to be reduced much lower than it is at present." He then proposes to restrict special appeals, and, after adding that he is opposed to their complete abolition, proceeds as follows : "I think, however, much may be said in favor of an alteration of the law of special appeal. The Court is inundated with special appeals, and of these it may safely be said three-

fourths are rejected, because there is no sufficient ground for admitting an appeal on any point of law. Litigants are persuaded by their Mookhtears, both in the Mofussil and in Calcutta, that they have a good case, and the pleaders attached to the Court frequently err in the opinion they give to their clients regarding their cases, and thus numbers of special appeals in which there is no real ground of appeal are filed, and the wretched litigants are fooled into the belief that they have a good case, while they are at the same time fooled out of their money."

Mr. Justice Loch adds that "the mode in which special appeals are disposed of" shows "that the defect of investigation, if there be any, does not principally lie in the finding on a point of law, but on a finding of fact which the Court cannot correct in special appeals," which, he argues, proves that the special appeal does not act as check of any importance over the lower Courts. He adds—"Many of the persons who come up to this Court do not understand the nature of a special appeal. They think it very hard that the highest Court of Appeal in the land will not look into the evidence or try the facts of the case; they evidently come up thinking that the High Court must do justice, or at least will hear the whole case over again; and I am afraid many clients are persuaded by their law advisers to file special appeals, little knowing the nature of an appeal of the kind, but believing, as they are told, that it has an efficacy which will put all things right."

Mr. Justice Loch, after using these arguments, which appear to lead to the conclusion stated by Sir Barnes Peacock, proposes that special appeals should be abolished in cases of less than Rupees 500 value. He gives no reason for the limitation.

Sir Charles Hobhouse.

Sir Charles Hobhouse proposes that special appeals should be abolished in cases below Rupees 500, but that the inferior Courts should always be permitted to state cases for the determination of the High Court, whatever the nature or value of the case might be, the High Court having "jurisdiction to determine the case so stated as well on the facts as on the law." I suppose that this means that the High Court should have power to draw inferences of fact from the statement made in the judgment and other documents filed upon special appeal. Otherwise it would be hard to understand this proposal, as the only use of stating cases, so far as I am aware, is that the facts should be decided by the person or Court stating the case. Be this as it may, Sir Charles gives eight reasons against the present system, of which the following may be specially noticed :

Reason aginst the present system.

Because the Courts below are every year improving in qualifications;

Because to the suitors themselves in special appeals, the costs are altogether ruinous, and very generally altogether in excess of the whole value of the property in litigation ;

Because the remedy given by the High Court in special appeal is seldom a complete remedy to the successful appellant, but is

generally a mere reference back to the original tribunal usually with this simple result, *viz.*, that the tribunal may in the end re-affirm its first judgment;

Because he believes that the Court of Special Appeal is extensively abused by wealthy suitors to drive the poorer party, who has been successful below, into a compromise;

Because the High Court, as matters now stand, often finds that it cannot interfere where it would, or that it is called upon to interfere where there is no cause for it.

Sir Charles Hobhouse gives one fact in proof of his allegation that in the majority of special appeals, the errors, if any, have been on points of law, on which the case does not really turn. In such cases the Court must remand. Now on an average of five years, 869 cases were remanded out of 1,195, which were decided more or less in favor of the appellants. "If the High Court," he adds, "possessed the jurisdiction of determining cases in special appeal before it on their merits, there would not probably be 100 out of the 869 cases annually remanded which would require any remand at all." He adds—"As the law now stands, the High Court must remand these cases, and does so to the further vexation and expense of the litigants, and it may be only to have the cases back again in a second or even third or fourth special appeal."

Sir Charles Hobhouse on appeals in general.

In the latter part of this Minute, Sir Charles Hobhouse goes at length into the more general question of appeal. He says—

"Now, what satisfaction can a judicial system, such as I am about to describe, give to a native of this country?

"A subordinate Judge, a native of the country, acquainted thoroughly and from his earliest days with the language and manners, habits and thoughts of the people, educated it may be to the law, trained to it to some extent certainly, and holding his high post by reason of his efficiency, hears and sees a witness depose, comes to an opinion upon his credibility, relative or positive, and gives judgment accordingly.

"An appeal lies to the District Judge; that Judge is a foreigner; he has had no better, if so good, legal training as the first Judge; he has not had the benefit of seeing or hearing the witness depose; he would not naturally be so good a Judge of his credibility if he had seen or heard him, but he has nevertheless jurisdiction to come, unassisted by any other Judge, to a different opinion on the question of the credibility of the witness; on that question it usually is that the whole case turns, and on that question his judgment is final.

"If that judgment is for the reversal of the decision of the first Judge, can it possibly give anything but dissatisfaction to the public generally?

"I believe, then, that the Court, as at present constituted, do not, and I think they cannot, give satisfaction to the public, but I think they may be improved."

Proposals.

As a remedy, he proposes the extension of the Small Cause Court system for cases under Rupees 500, and the establishment of District Courts, each to consist of two Judges, from whose decision, unless the Judges differed, there should be no appeal either upon fact or law, though they should have power to state cases for the opinion of the High Court.

Mr. Justice Bayley.

Mr. Justice Bayley proposes to abolish special appeals in the first instance in cases under Rupees 100 by way of experiment. After two years' trial he would extend the amount to Rupees 500. This he thinks would be safe, because, according to his experience, "a Munsif in the Court of First Instance who has been educated in our colleges and schools, and taken his law degree in our university, not only discharges his duties with ability, but with a faithfulness and care and perspicuity which is certainly not surpassed, if it is equalled (except in cases of promotion from the same style of men) by some of the subordinate Native Judges who hear the Munsifs' appeals."

He thinks that good Zillah Courts might be provided, which would act as Courts of Appeal from the Munsifs. They should be composed of a Civilian District Judge and two Native Judges, or of a Native and a Barrister-Judge. He would constitute 16 such Courts, eight of each sort. Their findings on fact up to Rupees 10,000 should be final, but on law he would give a special appeal to the High Court, and on facts also if the case was above Rupees 10,000. He points out the superstition, as it may almost be called, of the Natives about appeals. "The fixed but mischievous idea in the Native mind upon the subject of appeal can hardly be understood by any one who has not been a Judge in the Zillah Court." He gives an instance of a Muhammadan gentleman who, in reply to his question why they appealed in hopeless cases, said that to him (Justice Bayley) it might be very unintelligible, "but that their fixed idea is when they lose a case, *appeal kurne hoga*, that is, right or wrong, we must appeal."

Mr. Justice Louis Jackson—

Mr. Justice Louis Jackson discusses the whole subject at length, and if I may say so, with remarkable ability, in a paper which deserves to be read through. He speaks of "the habitual perversion of the right of appeal," and "the wholly inadequate part assigned to or performed by the Courts of First Instance." He considers that in about one-fifth of the number of appealable cases, appeals are actually brought, and that "where the wrong party in the lower Court fails to prosecute an appeal, in four cases out of five the omission arises from either want of means or want of energy." He attaches little importance to the suggestion of limiting the right of appeal by the value of the sum in dispute. "If a *plebiscite* could be taken to-morrow on the retention of appeal, we should see a much larger affirmative majority than was lately returned by the French people on a different question; so inveterate is the distrust of the existing Courts of Original Jurisdiction; and if the loss of appeal is ever to be tolerated, it can be only on the condition of greatly strengthening

and improving those Courts. Any attempt at dealing with the matter by extending the principle of minimum values in special appeals to land suits and the like would be likely to end in disappointment. Even under the law now in force, the value of suits, except for sums of money certain, is a highly *elastic* thing, and if it became law, that special appeal be taken away in any suits below Rupees 500 which are not now to that restriction, cases passing the limit would soon become so numerous subject as to excite surprise."

Would allow appeals in certain cases.

Mr. Justice Jackson would allow of appeals in four cases,—

(1) where an appeal is permitted to the Queen in Council, there must first be an appeal to the High Court;

(2) where an Appellate Court has reversed the judgment of the Court of First Instance, there should be a further appeal;

(3) where a Court consists of more Judges than one, and the Judges differ, there should be an appeal;

(4) where the case is certified to be a fit one for appeal by some one of a limited number of pleaders or advocates specially empowered by the Court to give such certificates.

Upon this I may observe, that, in case 1, appeal to the High Court, and in case 2, the appeal to the intermediate Court, seem to me to be useless. In case 3, I would decide by the majority, for if an appeal is admitted, the majority decide, and you thus get only increased proof of the doubtfulness of the case. Case 4, I think, would, in practice, only add an additional form and a little expense to the process of appeal.

Appeals should be confined to questions as to land and status.

Except in the first class of cases, Mr. Justice Jackson would further confine appeals to cases relating to real property and to status. He considers it, however, the first condition of all reform to strengthen the Courts of First Instance. His account of the existing Courts and of the way in which he would alter them, is very instructive, and is as follows:

Plan for improving inferior Courts.

"I must now state my views as to the mode of strengthening the inferior Courts, and as to the constitution and functions of those Courts. I conceive that these ought to be of two grades only,—1*st*, the Munsifs' Courts, and 2*nd*, the District Courts. The Munsifs ought to be restricted to the trial of suits for money or moveable property, the limit as to jurisdiction being somewhat enlarged, say to Rupees 2,500; and their decisions up to Rupees 50 ought to be final, as far as appeal is concerned, but subject to revision by the District Court.

"Suits for immoveable property, or involving any interest in such property, as well as suits relating to adoption, inheritance, marriage, or the like, should be commenced only in the District Court. I rest this proposal far less on the ground of unfitness in the Munsifs themselves, than on the absence, at Munsifs' stations generally, of Pleaders, or other

legal advisers, who are competent to assist the Court or guide the parties; and in some degree, on the circumstances in which the Munsifs exercise their functions. A certain proportion of the Munsifs everywhere must be officers of little experience, and with them inexperience is not merely the novelty of the judicial function, but entire unfamiliarity with business; for our Munsifs are commonly appointed fresh from College, and are consequently as new to the affairs of life as they are to office. Thus prepared for the bench (now-a-days I believe with a good deal of undigested law in their heads), they are often planted in a small mofussil village with no greater potentate at hand than the Police Inspector; no public opinion; no superior within visiting distance; surrounded by obsequious Amlah and ignorant Pleaders. These are not conditions favourable to the strenuous exertion of a man's powers of mind, and the Pleaders usually form only an additional difficulty; for if the parties were to come immediately before the Court and tell their story, the Judges might have some chance to get at the real matter in dispute; but after the intervention of the Pleaders, the facts are almost certain to be mis-stated, the ground of claim misrepresented, and the remedy available mistaken.

"When a suit has thus been commenced upon a wrong basis, the difficulty of afterwards putting it right is very great; and I am persuaded that, generally speaking, the Munsifs in the Mofussil are placed at a disadvantage in trying the more intricate cases; and this being so, I think the jurisdiction of these Courts ought to be confined to the simplest subjects. But the Sadr Munsifs, who are usually, and might be always, experienced officers, and whose position is altogether better, might try suits for lands not exceeding Rupees 2,500 in value on reference by the Zila Judge.

Position of District Courts.

"And this brings us to the District Court, which ought to take so important a part in the administration of justice, and which, as a Civil Court, falls so far short of what it should be. Displaced by the subordinate Judge in the trial of original suits, over-shadowed by the High Court in appellate jurisdiction, the Zila Judge takes only a secondary share in the administration of civil justice, and perhaps, at present, his most useful function is that of Superintendent of the inferior Courts; and this can only be well done where the Judge possesses experience and energy, and is not over-much pressed with other duties of detail."

Possible reduction of number of High Court Judges.

The result of these changes as regards the High Court would be in Mr. Justice Jackson's opinion, to relieve them of much of their work, and to make it possible to reduce the number of Judges very largely. He thinks that the number of Judges in the High Court of Calcutta might be reduced from 13 to 7. This, he thinks, would be in itself a great advantage.

Advantage of reduction.

"It is right to say that, apart from considerations of economy, there is another reason which I confess has great weight with me in favour of reducing the High Court to a less number of Judges. It is this: The

concurrent and unceasing delivery of numerous unconsidered judgments by many Judges, all entitled to equal respect, tends in some degree to confusion, to diversity of decision on the worse points, and consequently, to a diminution of the prestige and authority of the Court. The judgments of the High Court, to be useful in the degree expected of them, must, it seems to me, be comparatively few, thoroughly well considered, pronounced by a sufficient number of voices after sufficient argument. At present, excepting what are called Full Bench Cases, hardly any of our decisions answer this description. The Court is a kind of mill into which thousands of cases are cast, and considerable pressure being applied to the turning of many wheels, the cases come out ground certainly, but without that accurate sifting which is required for discrimination of the different grains. I think, too, most people are now afraid; in fact, I never hear an opinion to the contrary that the experiment of making the local business of Calcutta a branch of the business of the High Court has not succeeded, and that at least the civil business should be taken by a separate local Court."

Mr. Justice Phear.

Mr. Justice Phear goes further than any of his colleagues, for which reason I have reserved his communication for the last. His view is, in general, that the present system of appeal requires not only to be greatly simplified, but to be placed on a sounder foundation than the present one. After giving a short account of the existing system, he observes—"The Court of regular appeal manifestly, I think, stands in an inferior position compared with the Court of First Instance in regard to efficiency for the taste of ascertaining and determining the disputed facts of the case." This he regards as a consequence of the fact that it judges on written evidence instead of seeing the witnesses. He points out, however, that the Courts of First Instance are not fit to take evidence. "They are unskilled in the art of trying suits." He says—"Most of the Judges of those (*i. e.*, the Mofussil) Courts have a very competent knowledge of law, but few, if any, know how to make the testimony of witnesses take such a shape as will serve to exhibit its intrinsic value." .... "I might say that in 99 cases out of 100, imperfect examination and entire absence of cross-examination leave the case so bald of trustworthy material, and so denude of all circumstances, that it is absolutely impossible for a Court to found a satisfactory decision upon it, unless with such aid as is deducible from the behaviour of the parties themselves and the witnesses at the trial. But unfortunately it is still too much the custom for the parties to the suit to keep away from the Court altogether, and generally it would be an abuse of terms to say that any one conducts the case on their behalf. The persons who act as Advocates in the Mofussil Courts have as yet very little knowledge of the business of conducting a trial. Indeed, scarcely any of the Courts themselves manifest a sense of the great importance of method in a judicial investigation, and by the practice of taking the examination of one or two witnesses on one day, as many more on another after a considerable interval of time, and so on, they deprive themselves in a large measure of the special advantages which attach to a properly-conducted trial by oral testimony."

Mr. Justice Phear adds—

Present system of appeal.

"According to our civil procedure defects of trial, such as those to which I have called attention, cannot, as I think, be effectively remedied. The first step to be taken by a disappointed suitor to get the judgment of the first Court corrected is, as I have already mentioned, a regular appeal; and by the Civil Procedure Code the Appeal Court is expressly forbidden to remand the case for trial, except when it has happened that 'the Lower Court has disposed of the case upon a preliminary point so as to exclude any evidence of fact which appears to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court upon such preliminary point is reversed by the decree in appeal.' Unless this has occurred, the Appeal Court must try the case itself upon the material sent up to it, however imperfect and valueless that may be, though with a limited power, no doubt, under some circumstances, of causing this to be supplemented by additional evidence. But clearly a power of this kind is altogether insufficient to meet the evil; for I may reiterate that, generally speaking, nothing short of a new trial can remove the mischief to which a bad trial gives rise. It is impossible, for example, without a fresh examination, to say into what form such evidence as that which I have above hypothetically quoted would be transmuted by a proper process of questioning."

Special appeals.

On the subject of special appeals, Mr. Justice Phear says—

"If the suit is of the lower valued class, the party aggrieved by the decision of the Appeal Court has still another chance open to him. He may appeal specially to the High Court 'on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground.' These words of the Legislature do not leave its meaning altogether without obscurity, and it is curious that no legislative direction is anywhere given as to the course which the High Court should take when satisfied that any one of the grounds mentioned is made out. In extreme cases the High Court has, I believe, on special appeal, gone so far as to direct a new trial in the first Court, when the Lower Appellate Court could not lawfully have done so. And obviously, in any such case, the regular appeal represented so much time and money thrown away. Generally, however, the High Court considers itself bound to confine itself to controlling and directing the action of the Lower Appellate Court, with the view to secure, as far as may be, that, in the determination of fact, that Court shall exercise a judicial discretion upon the materials properly brought before it by the record of the first Court, and in the other modes provided by the Civil Procedure Code. And when the findings of fact come to by the Lower Appellate Court cannot be impeached for want of such discretion, then the High Court passes such judgment as those findings warrant in law. But I may venture, without risk of contradiction, to say that the cases are very frequent in which the High Court sees, either that the evidence

before the Appellate Court does not fully exhibit the relation between the parties and the facts of the matter in dispute, or that the Lower Appellate Court, in the exercise of its discretion, has differed from the first Court in its view of the fact for no apparent reasons, or for reasons which are unsatisfactory. In such cases the High Court cannot help feeling that the decision which it is obliged to leave untouched very probably does not affect the right determination of the suit between the parties, and yet it is powerless to do anything towards bettering it. In all cases of this sort, it is clear that the interposition of the Lower Appellate Court between the Court of First Instance and the High Court is productive of absolute mischief.

"And, indeed, it may be said, shortly, that the Lower Appellate Court only does really effective work when no appeal is preferred against its decision. In those instances in which the suit goes by special appeal to the High Court, scarcely ever is anything gained by the intervening judgment and findings of the Lower Appellate Court; for if these make no alteration of the state of facts at which the first Court arrived, they are practically useless, and if they *do* make an alteration, generally speaking, they are such as to be distrusted."

Mr. Justice Phear's recommendations.

Reserving for a future occasion a full explanation of his views as to the proper remedy for these evils, Mr. Justice Phear observes of his plan—

"Its principal features are abolition of the appellate functions of the Zila and Subordinate Judges, union of the Munsifs, Subordinate Judges, and Judge into one Court of original jurisdiction, having a single organization, at the head of which should be the Judge; appeals to lie as of right to the High Court only in suits valued at Rupees 1,000 and upwards, and upon grounds of objection, which must have been made either at the trial or with the leave of the Judge who presided at the trial within a certain limited time afterwards, and must be stated by that Judge. But in all cases whatever, the High Court to have power on good cause shown to revise the proceedings of the Lower Court, and both upon appeal and upon such revision to direct a new trial, or, if it thinks the trial has been good, to pass such decree as, on the facts found and stated by the Court below, the law warrants.

New trials and appeals.

"The most material alteration which I here suggest is no doubt the substitution of a new trial for the regular appeal, and I am aware that many persons in this country, whose opinions deserve the greatest respect, are persuaded that a new trial is pregnant with risk of fraud. For my own part I feel confident that this is not so. If the testimony of a witness is false, or prepared, the surest way of obtaining the clue to this fact is by making him re-tell his story after an interval of time, and the appearance of *new* evidence on the second occasion carries with it a significance either the one way or the other, which must be always a most important guide to the truth. Besides, the rehearsal, so to speak, which is afforded by the first trial, even apart from the experience

gained by the discussion in the superior Court, teaches the parties to put their case much more effectively before the Court on the second trial than before. It seems to me clear that, considered merely in regard to the interests of justice as between the parties, a second *trial* is always a good rather than otherwise."

Summary of Judges' views.

I have given the opinions of the High Court Judges, who up to the date of this Minute have sent in their opinons somewhat fully, because no opinions can be entitled to greater weight. I think it is not an unfair summary of them to say that, whilst they differ in details, their general conclusion is, that the whole system of appeals in civil cases is radically faulty; that the number of appeals ought to be greatly reduced and the inferior Courts much strengthened, and that the effect of this would be highly beneficial not merely to the subordinate Courts, but also to the High Court itself. The fault of the existing system, as described by them, is, in a word, that it aims at curing a rotten foundation by an intricate and expensive superstructure.

Minor points.

There are a few special points noticed by the different Judges, to which I may call attention before I conclude this part of the subject.

Mr. Justice Phear on Civil Amíns.

Several of the Judges insist upon the bad results of the employment of subordinate local officers called Civil Amíns. Mr. Justice Phear says that in suits regarding land between neighbouring proprietors, the Courts are extremely fond of, in effect, delegating the decision of the suit to an Amín, whom, under powers given them by the Legislature, they send to the spot ostensibly to make a local investigation (a proceeding by the way not in the least needed in the large majority of instances), but really to prepare a report upon which the Court is ultimately to base its judgment I need scarcely point out what an opening for corruption is hereby caused, or how unreal becomes the trial before the Court which follows thereafter.

Mr. Justice Jackson on Civil Amíns.

Mr. Justice Louis Jackson says on this subject—"I would add two desiderata,—

"(1.) Abolish Civil Court Amíns and appoint instead Commissioners, to be attached, one or more, to every District Court on a salary of Rupees 250 a month. Enable Munsifs also to act as Commissioners by order of the District Court, parties paying a fee for the service of such Commissioner at the rate of Rupees 16 per diem. The object of this is to put a stop to the existing abuse of referring all sorts of enquiries, with or without reason, in cases great or small, to Court Amíns, who are quite an inferior class of officers, paid at the rate of Rupees 50 or Rupees 70 per mensem, according to grade, the fee for their services being Rupees 3 per diem, the Court thus remitting the suit virtually for decision to an inferior officer, and the parties notoriously expecting to influence by irregular means the opinion of a poorly paid public servant who has a good deal of power in his hands."

Mr. Justice Bayley on Civil Amíns.

Mr. Justice Bayley says upon the same subject—"To make these (*i. e.*, the Zila) Courts really efficient, and to save their time from useless interruptions, and to have real data on which to found judicial decisions in the many land cases involving local inquiries in this country, it is essential that the present body of Civil Court Amíns be entirely revised. The Civil Court Amíns were notoriously inefficient, if not partial, or even corrupt. The improvement of the class was attempted about A.D. 1854-55-56, when Act XII. of that last year was passed; but it was provided in the instructions then issued that the old Amíns, who could pass a specified examination in survey by compass and scale, should be continued. It is well known how quick and proficient the Native mind is in mathematical and geometrical studies. Thus, the great body of the old class Amíns, with all their bad principles, were able to pass the necessary examination in surveying by compass and scale, and were continued, and are still continuing, as Amíns or Commissioners, who, under Act VIII. of 1859, are deputed to carry on local investigations." Mr. Justice Bayley would substitute for them a new class of Commissoiners.

Mr. Justice Bayley on the sale of decrees.

Another matter of very high importance, to which Mr. Justice Bayley calls attention, is the sale of decrees. His remarks are as follows:

"There are two other most serious evils in our Courts, the existence of which tends to greater expense of judicial establishment. These are, 1*st*, the speculative purchases of suits, or rather the subject-matters of suits; and 2*nd*, the speculative or other purchases of decrees. The first is carried on by men who are, so to speak, *suit-brokers*, and of course their object is not to get redress or justice done to them for any personal injury or loss, but to make the loss alleged by *others* form a profitable *investment* to themselves *by any means they can*. The same remark equally, if not in a greater degree, applies to the sales of decrees. The evil here is a greater one, because the purchaser of a decree not only tries to get full execution of the decree, but he generally attempts to make his purchase more profitable by taking under cover of that decree much that he knows does not belong to him under it. His object is so to threaten and annoy others by his action under the decree, as to make it worth their while to give up something which is really their own, rather than be involved in litigation and expense, of which they cannot see the end, and cannot cope with the speculator on equal terms. But if they do not thus give in, there is renewed litigation going to same lengths, and ending possibly in the same result, *viz.*, speculative re-purchase of suits and decrees, renewed without end. Again, when a speculator purchases a decree, objectors start up in various directions in the so-called miscellaneous suits, some with rightful claims and some without, and protract the litigation with *new* purchasers, which possibly they would not have attempted, or would have settled otherwise, if the *original* decree-holder was executing the decree. Fraud and perjury have, to my experience, been the concomitants of such litigation, specially

leading to the grossest abuses under the *bináme* system. I would, therefore, with a view not only te reduce litigation, but also to purify the administration of justice in a direction in which it seriously needs amendment in all Courts, have it enacted that neither the subject-matters of suits nor decrees should be permitted to be bought and sold."

Appeals to the Queen in Council.

I have hitherto left unnoticed the question of the final appeal to Her Majesty in Council, and it would obviously be improper to go into the subject at any length as the matter cannot be regulated by legislation in India. The course of appeal in India has, however, a close and obvious connection with the course of appeal to England, and we ought to keep in mind the existence of such an ultimate appeal in any plan which is formed or improving the administration of justice in India. The subject of appeals to the Queen in Council, though highly important, appears to me to lie in a narrow compass. The evils complained of in the existing state of things are—

Evils complained of.

(1) the great number of appeals to England;

(2) the difficulty of deciding questions of fact in England in a satisfactory manner.

As to the great number of appeals to England, I think that the cause is two-fold. In the first place it is obvious enough that the people of India, or at least the people of Bengal, are passionately litigious, and will appeal as long as they possibly can. In the next place I think that the remarks of the Judges, of which I have just given a full account, show distinctly that the High Court of Bengal at all events (from which come much the largest number of English appeals) is in a most unsatisfactory state. The system described by Mr. Justice Jackson—a system under which five or six division benches composed principally of Civilian Judges, few of whom have had any special legal training, are continually engaged in "the concurrent and unceasing delivery of numerous unconsidered judgments,"—must tend to the worst results, and accounts not only for "a diminution of the prestige and authority of the Court," but for any number of appeals.

Bad materials supplied to Appellate Courts.

As to the second point, it seems clear that it is practically impossible for a Court sitting at a distance to determine, with much chance of determining rightly, upon materials supplied to them in the manner in which the materials for the Appellate Courts are supplied in regluar appeals. I cannot see, however, that it makes very much difference, whether the Appellate Court sits in Calcutta or in London; and, strange as it may seem, the Court in London has considerable advantages over the Court in Calcutta, the nature of which is displayed in the following remarks taken from the Minute of Sir Charles Hobhouse:

Sir Charles Hobhouse.

"In every special appeal to the High Court, the judgments, where (as is the rule) they are in the vernacular, of the Court of First Instance and

of the Lower Court, are translated and transcribed, and the grounds of appeal are transcribed by the hand.

"In every regular appeal to the High Court, the plaint, the written statements of the parties, and in the majority of such appeals the judgment of the Court of First Instance are translated, and these papers, together with any others that the parties may wish to present particularly to the notice of the Court, and together with any notes of the examination of witnesses that have been recorded in the English language, are printed, a certain number of copies being struck off.

"All these translations, transcriptions, and printings are made at the expense of the State.

"In cases that are appealed to Her Majesty's Privy Council, all the papers of the record that, with the sanction of the High Court, the parties desire to have placed before the Privy Council, are translated and printed at the expense of the parties, the said expense being afterwards treated as costs in the cause and debited to the losing party."

Materials for decision of High Court.

Sir Charles Hobhouse mentions these facts for the sake of a suggestion that the parties should pay for the printing, translation, &c., in common appeals before the High Court. The suggestion is important, though I cannot now consider it at length; but incidentally it sets in a clear light a fact of the highest importance, bearing not only on the question of appeals to the Queen in Council, but on the question of appeals to the High Courts. It shows that the Privy Council have, and that the high Courts have not, before them the written evidence as to the facts on which they are to decide. I believe the course of an appeal in practice to be somewhat as follows in the High Court of Calcutta: the Judges have an opportunity of reading before the appeal comes on what in England would be called the pleadings and the judgment, but the evidence is given and is presented to the Court in a language which many of them, and in particular the Barrister-Judges, do not know, and in a character which even the Civilian-Judges are not expected to be able to read. They get their notions of the evidence from the statements made by the pleaders at the hearing, and by sending for and having read any particular document which they may regard as important. The result is, that the High Court of Calcutta is constantly in the habit of deciding questions of fact neither upon oral evidence, nor even upon a written note of oral evidence, but upon the imperfect statements made by pleaders on opposite sides of selected parts of illegible accounts written in an unknown language of what an ignorant mohurrir supposed to be said by witnesses who are never properly examined.

This appears to me an unsatisfactory way of proceeding, and I think that an appeal so decided is in reality no decision at all upon the merits.

I heard in Calcutta statements to the effect given above in conversation with High Court Judges and others; and in order to get a practical test of the matter, I asked a Judge to get me some records and go

through them with me. He accordingly got two from the Record Office of the High Court of Calcutta, which he said were taken quite at random by the officer, whom, however, he directed to bring "good big ones." One of them weighed 12 lbs., and the other, I think, eight or nine. It is impossible to give an idea to any one who did not see them of the state of inconvenience, unwieldiness, and utter confusion in which they were. They were altogether destitute of any sort of arrangement. The papers were here and there in English, especially the judgment of the District Judge, and his notes of some evidence taken before him; but most of them were in the Native character and of a most unmanageable shape. I unfolded one bundle of paper, which must have been more than fifty feet long. It contained the depositions of a great number of witnesses as to customs and boundaries, taken at intervals ranging over a long period of time. As soon as my friend saw it, he said that he could tell by the way in which the evidence was taken that it had been taken by mohurrirs by themselves, and not under the direction of the Judge. We passed a whole morning over the papers, and at last disentangled the outline of part of the story. We must have passed days in studying it before we could have got to the bottom of the matter. What we saw showed various irregularities, and in particular one strange break, from which we inferred that the Sessions Judge must have called up the case from the Native Judge in order to try it himself *de novo*, but we could find no documentary proof of this. At one stage in the proceeding, a Court Amín had been sent to make a local inquiry and returned that he had not been able on account of the heat, fear of tigers, and the changes in the course of a river, to get at the place in dispute. The High Court had given judgment principally, as it appeared to us, upon the legible part of the proceedings—that which had been recorded by the Sessions Judge. We had to trace the judgment of the High Court by reference to a book called the Weekly Reporter, which prints all High Court judgments indiscriminately and without any statement of the facts of the cases, except what are contained in the judgments themselves. It did not finally dispose of the matter after all.

Specimens of records on which High Courts decide.

Remarks.

Two cases, of course, prove very little, but they certainly did confirm precisely what I had been informed was the case as to the way in which appeals are disposed of in the High Court, and they did correspond precisely with what I should have expected to be the consequences of the system under which business is conducted there. It seems to me that the system must fall into one of two results, each of which is fatal,—either the Judges must, as at present, decide in the manner described by Mr. Justice Jackson, or they must re-try from the bottom all the cases brought before them. In the first case they will scramble through their work somehow, and will deliver a vast number of judgments, of which a large proportion will be altogether unsatisfactory, and of which many will be reversed on appeal. In the second case the Court would simply be choked with arrears, and an appeal to the High Court would hang the

matter up for many years. The plain truth is, that a system which reduces Courts of First Instance to insignificance in comparison with a Court of Appeal is incurably vicious, and can never be made to work well. The one thing needful is to make the Courts of First Instance trustworthy and competent.

Recommendation as to appeals to the Judicial Committee of the Privy Council.

With regard to the special question of appeals to the Judicial Committee, I have only to add that it appears to me that they stultify appeals to the High Court. I know of no instance in which a double appeal can be justified. Grave complaints are made in England of the expense and delay of the appeals to the Court of Exchequer Chamber and to the House of Lords (which are upon matter of law only), and I think that appeals should either go straight to the Privy Council from the Courts of First Instance, or should be in the shape of cases reserved for the opinion of the Court above upon facts found by the Court below. I think, too, that the limit of Rupees 10,000 is far too low.

The condition of the Bar in India.

There is one question still remaining, connected with the subject, on which as yet I have said nothing. It is the condition of the Bar in India. It is needless to enlarge upon the importance of a good Bar to the administration of justice. It is almost equally needless to point out that in India such an institution exists only in a few great towns, and in particular in the three Presidencies. I believe that if by any means a competent and trustworthy Bar could be obtained, such a result would do more than all others put together to make the administration of justice in this country satisfactory.

Advocate General.

There are at Calcutta, Bombay, and Madras, Advocates General who are not members of the Civil Service, but English Barristers, whose official connection with the Government gives them a commanding position in their profession. Their duty is to advise the Government upon legal questions referred to them, and as they have always a very extensive private practice, they are in a very independent position, and take practically little part in the vindication of the legal rights of the Government. They do not even prosecute *ex-officio* in cases in which the Government are interested. The Wahabee prosecutions at Patna were conducted not by the Advocate General, but by a Bengal Civilian.

Government Advocates.

In the North-Western Provinces, in the Panjáb, and Burmah, there are also Government Advocates, of whom the two first mentioned are Barristers, who are allowed to practise at Allahabad and Lahore, respectively; the third is an attorney who practises either at Rangoon or at Moulmein. None of them are members of the Civil Service, and neither in respect of rank or pay do they occupy the sort of position which ought, I think, to belong to the legal advisers of Governments as large as considerable European countries. They are not, indeed, paid upon a scale which entitles the Government to call upon them to undertake duties which would naturally fall to their share, such, for instance,

as the management of important prosecutions. The Officiating Government Advocate at Lahore lately refused, and, as I thought, he was justified in refusing, to go to Peshawur to conduct a prosecution there as part of his duty. He has no inducements as regards either pay or prospects of promotion to do more than he is bound to do by the terms of his engagement.

Government Pleaders.

Besides these officers, whose relations with the Government cannot, I think, be regarded as entirely satisfactory, there are, in every District, Native Government Pleaders. In Bengal they are paid by fees, besides receiving a trifling retainer, Rupees 50 or so per month; but the place is much sought after on account of the professional position which it gives. Few of these men, however, are fit to be entrusted with cases of special importance, either civil or criminal. The only strictly legal office held by a covenanted civilian is that of Legal Remembrancer. His position is a strange one. He has no other legal training than that which is common to civilians in general, and he is a sort of intermediate person between the Advocate General and the Government Solicitor, who again is simply a Solicitor employed by Government in the way of his profession. The Legal Remembrancer has under him all the Government Pleaders, and his duty is to see that what may be called the private legal rights of the Government are properly enforced.

Legal Remembrancer and Government Solicitor.

The whole of this arrangement appears to me to be complicated and clumsy and, above all, to be wasteful, inasmuch as the result of it is to waste an admirable opportunity of providing training for judicial officers in the manner explained above.

CHAPTER VI.

What alterations can be made in the present system with a view to the increased employment of Natives and to economy?

Practical suggestions with regard to economy and increased employment of Natives.

I now come to consider what practical suggestions ought to be made as to the alterations to be introduced into the existing state of things, regard being had to the two objects of economy and the increased employment of Natives. It is as unnecessary to enlarge upon the importance of the one as upon the importance of the other of these objects. It may, however, be worth while to remark that the increased employment of Natives, especially in civil judicial matters, has been an object with the Government of India for nearly fifty years. The collection of papers on the subject published last year contains several documents on this point, dated from 1821 to 1829, of which I will quote one or two passages.

Increased employment of Natives advocated for many years by high authorities.—Despatch of Governor General in Council in 1826.

On the 29th June 1826 the Governor General in Council wrote to the Court of Directors as follows :

After speaking of the progress of education, the Governor General in Council observes—" And it must never be forgotten that such improvement in the people to be productive of much or unmixed good, must be met with corresponding disposition on the part of Government in all departments to open new prospects of liberal employment.

" It must otherwise probably be a source of disquiet and intrigue among the community; for, unless Government shall open some door for the employment of the talents, which their own liberality has in many instances elicited, and to a certain extent fostered, by making Natives of education and respectability of character eligible to the higher grades of the public service than are at present open to their fair and honorable ambition, the gift of superior knowledge, with whatever other advantages attended, can scarcely fail to aggravate the discontent of the educated classes; since, excepting the public service, the means of reputable employment for men of education and respectable family are comparatively confined, and in the service, as now constituted, though situations of responsibility held by Natives are numerous, it cannot be denied that the emoluments attached to them are altogether disproportionate."

Mr. Thomas Munro, Mr. Mountstuart Elphinstone, and Sir John Malcolm, amongst others, have expressed themselves most strongly on this subject. However, the principle that Natives ought to be employed as much as possible, and that the judicial service, especially on the civil side, affords the best field for their employment, are now so generally admitted, and are, as I think, so clear in themselves, that they can derive little additional weight from any express testimony in their favor, however high. I will, therefore, content myself with saying that any one who will take the trouble to refer to the collection of papers upon the subject already mentioned, will find there a chain of the highest possible authorities, extending over the last fifty years, all of which enforce in different ways, but substantially on the same grounds, the principle which I have stated.

Economy.

On the question of economy I need only observe that, in connection with such a matter as the administration of justice, economy consists principally in getting full value for the money laid out. No one can doubt that it is well worth the while of every country to have as good an administration of justice as money can buy. On the other hand, badly conceived systems are almost always wasteful, because they almost always err, as I think our system errs, in setting people to do work which had much better be left undone.

Recommendations.

I now proceed to make the recommendations on the subject which present themselves to my mind, and which I have deferred to the conclusion of this Minute, because they form a more or less systematic whole, each

depending, to a certain extent, upon all the various considerations to which I have referred above.

I may begin by re-stating the principal conclusions at which, in different parts of this Minute, I have arrived.

They are as follows :

Conclusions arrived at above.

I.—The conditions under which justice must be administered in India are such that it is idle to hope that it will ever reach what would be regarded in England as a satisfactory standard.

II.—Hence the main problem is rather as to the form in which practically inevitable evils are to be endured than as to the way in which they are to be removed.

III.—It is not desirable to separate absolutely all judicial and all executive duties, but it is desirable, except in wild Districts, to separate them as far as possible.

IV.—The best division of labor possible under the circumstances of the case is between civil judicial functions and criminal judicial functions united with executive work.

V.—Criminal judicial functions must be kept mainly in the hands of the District Officers.

VI.—Civil judicial work is at present ill done, inasmuch as the inferior Judges are better trained for it than the superior Judges, who are not trained at all.

VII.—The present system of procedure, both criminal and civil, is objectionable, because the system of appeal is complicated, but a free right of appeal to a certain extent is a necessary evil as the only available check on Judges, who are subject to none of the checks which apply to Judges in England.

VIII.—The appeals in most cases lie from a better to a worse instructed tribunal, and in some cases from a tribunal which cannot be regarded as in any sense inferior to the one appealed to.

IX.—The High Courts to which the final appeal is made, and especially the High Court of Bengal, are constituted and instructed in an unsatisfactory manner.

These are the main results, to the proof of which the foregoing remarks have been directed.

Recommendations must be general.

The question now to be considered is, how they are to be remedied. It would obviously be impossible for me to propose anything more than the general outline of a plan, the details of which must be filled up by others, if the general principles on which it is based are accepted.

Of the conclusions above enumerated, those which I have numbered I., II., and IV do not suggest any immediate alterations in the existing

state of things, though, if true, they ought to be borne in mind in every alteration which may be made. Those which I have numbered III., V., VI., VII., VIII., and IX., suggest alterations which I now proceed to describe.

Application of principle III. Re-organization of Non-Regulation Provinces.

The principle that it is not desirable to separate absolutely all judicial from all executive functions, but that it is desirable, except in wild Districts, to separate them to the extent specified, suggests the re-organization of the services in the Panjáb, the Central Provinces, Oudh, Burmah, and the other Districts which are administered upon what is called the non-regulation system, those Districts only being excepted in which the state of society still requires a special mode of treatment. It is impossible for me to deal with the question how this is to be done, except in the most general way; but some remarks suggest themselves, both upon the more civilized and the wilder of the Districts which it concerns.

With respect to the more civilized Districts, it is obvious that if I am right in thinking that the present officers are charged with heterogeneous functions, which distract their attention and interfere with each other, one of two results must follow,—either the work must go undone, or the arrangement must be wasteful. If the executive and judicial duties of a Deputy Commissioner, for instance, interfere with each other, it is obvious that, if he does the whole of his business, he will waste a considerable amount of public time, and that, if all the judicial duties of two Deputy Commissioners were put into the hands of a Judge, and all their executive duties into the hands of an executive officer, the Judge and the executive officer together would do more work than two Deputy Commissioners, and do it better. To work out the details of such an organization for a particular Province, and to exhibit its expense in detail, would be the duty of the Local Governments. Hence if we can solve the question, what is the best form of judicial organization for the empire in general, the further question, how the system can be applied to the civilized parts of the Non-Regulation Provinces, becomes a question of detail highly important no doubt, but to be solved by the local authorities.

Uncivilized Districts.

There is a natural temptation to exaggerate the difference which exists between the more civilized parts of the country and the uncivilized Provinces, of which the Trans-Indus Districts of the Panjáb may serve as a specimen. People constantly forget that law is a guide for the Judge as well as a rule for the public; and the fact that the public are too ignorant or careless to understand it, is no reason why the Judges should not know it. It is rather an additional reason why they should. The effect of popular ignorance on the subject will be that the people will be helpless against any error into which the Judge may fall; but this is an additional reason which the Judge's official superiors should keep a firm hand upon him. Take, for instance, the Penal Code. Whether we are dealing with Calcutta, or with the fiercest and wildest border tribe beyond the Indus, we must punish murder and robbery, and we must

define those offences in the same manner. So with regard to procedure. I do not see what a sensible person who wanted to get at the merits of a dispute between naked and ignorant savages could do beyond calling together the parties concerned, asking them what they knew about the matter, making a note of their information for the use of himself and his superiors, and finally passing sentence. Formidable as they look, the Codes of Criminal and Civil Procedure contain very little more than rules for doing this. Some differences of course there are. In a civilized community, a crime is, as a rule, the act of an individual, and to punish an innocent man for an offence which he did not commit is to add an additional evil to the evil which the crime has already inflicted upon society. In an uncivilized community, organized in clans, and where crimes often partake of the nature of civil war between clan and clan, the objection to making the entire community and each individual member to some degree responsible for the crimes of other members is much weakened. To what extent this joint responsibility ought to go, how far we should be justified in running the risk of punishing a man innocent of the actual commission of a crime, but probably guilty of having approved of and countenanced it, and what precautions are necessary to be observed for securing discrimination and prudence in the administration of punishment, whilst a· the same time prompt and rigorous justice is favored, are questions which persons who have been accustomed to the management of wild tribes in uncivilized Districts ought to decide.

Panjáb frontier tribes.

The Panjáb Local Government has lately submitted rules for the government of the Districts on the frontier lately brought under the operation of 33 Vic., Cap. 3. Similar rules have been made under the Agror Valley Act by the same authority. It is instructive to see how very little it has been thought necessary to deviate, even in these wild Districts, from the ordinary course of law established for the rest of British India. Power to fine villages for crimes not brought home to individuals, and power to punish women as well as men for adultery, are the most important differences between the rules established on the frontier and the law in force in the rest of the Panjáb. The officers responsible for the peace of the District ask for no substantial alteration in the Code of Criminal Procedure. Yet this is the very District in which within the memory of men still in middle life Avitable tried in vain to suppress crime by hanging people by scores from every tree at the discretion of chiefs who, as far as I can understand the matter, often differed very little from the robbers and murderers whom they mutilated or put to death.

Possible simplification.

The only further simplification in the administration of the law which I have ever been able to get the advocates of extreme personal discretion to specify, consists in power to punish people by death or otherwise, simply on the general opinion of a village that they are guilty, or on secret and untested information to that effect supplied to the District Officer. This is in reality nothing less than power to put people to death at discretion and without any trial at all. Rules of evidence sensibly

drawn and administered are derived from the very nature of things. To suppose that an officer displays executive vigour who puts a man to death on a bare chance that he may be guilty and without the existence of any facts which would lead a rational person to believe that he actually is guilty, is, in my judgment, an utter mistake. Any definite practical suggestion for the protection of witnesses, or for the exercise of some special power over persons reasonably suspected of having committed or being about to commit crime, would be at once considered by the Government of India, and, if approved, passed into law.

View of law taken by some executive officers.

Nothing has struck me more forcibly in India than the almost inveterate prejudice in the minds of many District Officers that law, instead of being as it is, that which the legislature enacts, has an independent existence and character of its own, and is a sort of mysterious enemy to them which, if introduced into what are unfortunately called Non-Regulation Provinces, will prevent all vigorous executive action. It is my belief that this a mere mistake, and that if they only use in an intelligent way the powers given them by the Penal Code and the Procedure Codes, and the Evidence Act, they will find them amply sufficient for every reasonable purpose, and will find the Codes themselves the greatest possible assistance in the discharge of their duty. It must always be remembered that, in proportion to the ignorance and simplicity of the people, law comes to be a rule rather for the ruler himself than for the subject, and its sanction lies in the censure which he will receive from his official superiors if he transgresses it. The officers who govern a turbulent and primitive District may, indeed, be compared to, it may rather be said that they are in the nature of, a highly civilized and carefully selected military force on active service, and the laws which they administer are their orders and articles of war. No one, I suppose, will deny that a highly disciplined military force on active service is or ought to be the very type of prompt, decisive, efficient action; but I also think that no soldier would deny that precise and distinct orders and a well defined organization are the very first conditions towards the efficiency of such an army. But the laws which the frontier officers have to administer are or ought to be such orders. If it can be shown that they are intricate or ambiguous, or that they leave too little discretion to individuals, by all means let them be altered; but to say that law is out of place in a rough District is the very same absurdity as to say that discipline and distinct and definite orders are out of place on a rough campaign. The experience of the Panjáb Government appears to me to show clearly that the laws actually in operation are not by any means too intricate or ambiguous to be understood and enforced by active and intelligent officers, and that they leave as much discretion to individuals as it is safe to trust them with.

Appeal more necessary in wild than in civilized Districts.

It may appear paradoxical, but after as much thought and inquiry as I have been able to give to the matter, it appears to me to be true, that complete simplicity and directness in

the administration of justice are attainable only in comparatively civilized parts of the country, and that, in proportion as the population is wild and the habits of the people simple, greater complication in the machinery for administering justice is required. This result is so different from what might have been expected that I arrived at it only after many conversations with officers whose experience had been principally in wild and primitive parts of the country. It admits, however, of an explanation which, when once stated, is very simple.

Explanation of this.

In a highly civilized state of society people are aware of their rights; they are advised by lawyers who well know what it is necessary to prove, and their disputes are brought before tribunals fully competent to deal with them. Hence, as a rule, there is no reason why the first trial should not be the last also. In proportion as the population amongst whom justice is to be administered becomes rude and uncivilized, the probability that the case will not be fully heard, and that the facts relevant to its decision will not be fully disclosed on the first occasion, increases. On the other hand resentment against injustice, real or supposed, is probably keener amongst wild than amongst civilized people, and the notion of acquiescing in a legal decision merely because it is a legal decision, is altogether foreign to their habits of mind. I have heard officially of one case at least in which a mistaken decision disturbed for years the peace of a wild District, the tranquillity of which was restored when it was reversed. Moreover, the wilder the District the greater is the necessity for preventing the officers in charge of it from contracting fierce and arbitrary habits. A vigorous man brought into contact with barbarous tribes is apt to require a great deal of supervision for fear he should more or less sink to their level. For these reasons I have heard from officer after officer, whose experience has been on the frontier of the Panjáb, that wild and turbulent Districts are precisely those in which the most watchful supervision is required. By all means they say suit the law to the country, but also by all means see that the law is enforced strictly and keep a firm hand on the officers who enforce it.

Result of two systems wanted.

The result of this is, that the system of appeal, as it stands, is better adapted for a comparatively wild than for a civilized part of the country. Where there are plenty of lawyers, and where the people are litigious, as is the case in Bengal, an intricate system of appeal gives rise to an immense amount of delay, chicanery, and waste of time, as sufficiently appears from the accounts given of the state of business at Calcutta by the High Court Judges; but, in the rougher parts of the country, the cases are, in most instances, comparatively simple (unless they have to do with certain special subjects), and the whole matter, appeal and all, is disposed of very speedily.* A case which has just occurred illustrates this. A fanatic murdered the Acting Judge of the Small Cause Court at Lahore. He was arrested, committed, tried, sentenced to death: his sentence was referred to and confirmed by the Chief Court, and he was hung within a week from the day of his crime.

* See observations below as to Oudh, p. 107.

I do not see how anything much more summary than this can be required in ordinary times. The procedure is quicker by far than that of any but a drum-head court martial.

From this it would seem to follow that different systems ought to prevail in different parts of the country. With certain adjustments in matters of detail, I think that the system which now prevails in the Regulation Provinces should be left substantially unaltered; that it should be introduced into the civilized parts of the Panjáb; that its introduction into the Central Provinces and Burmah should be considered; but that, side by side with it, a different system, better adapted for the more civilized parts of the country, should be gradually introduced as opportunity offers.

Sudden changes objectionable.

Any sudden or violent changes in existing systems are always objectionable for obvious reasons; but, under the circumstances of Indian administration, they would be mischievous and dangerous to the last degree. It is difficult to say whether it would be most dangerous to refuse to change at all, or to attempt to make sudden changes in a system built up by degrees and worked by a staff of officers whose time is fully occupied, and who can neither be exchanged for, nor supplemented by, others to any considerable extent.

The Code of Criminal Procedure will be re-enacted next winter, when a good many alterations in detail will, no doubt, be made principally with the view of clearing up defects of expression which have been detected by the Courts and have given rise to numerous judicial decisions, and the same course will probably be taken whenever it is resolved to re-enact the Code of Civil Procedure; but it seems to me that more general changes ought to be introduced by degrees, and as opportunity offers. This might be effected by passing an Act enabling the Local Governments to introduce the new system which I am about to describe into such Divisions, Districts, or other local areas as they might think fit. The system would, in this way, be put upon its trial, and, if found to be a good one, might be gradually extended.

More general gradual change by permissive Bill.

I would take the Division* as the unit of judicial administration, though the Local Government should be empowered to vary it. I would leave much as they are the powers of the Assistant Magistrates, Joint Magistrates, and Magistrates of Districts in criminal matters, nor would I alter the powers of the Civil Courts of First Instance; but I would constitute in each Division a Civil and a Criminal Court, of which the Civil and Sessions Judge should be president, and all the Full-Power Magistrates and Subordinate Judges in the Division should be *ex-officio* members.

Division Courts.

The Local Government should have power to appoint Small Cause Court Judges to be civil members, if they thought fit.

The Commissioner of the Division should exercise executive authority over these Courts, and, in particular, should convene them from time to time to dispose of business. Each Court should consist of three members,—the Judge and two Full-Power Magistrates,—for criminal cases. The Judge and two Subordinate Judges or other civil members for civil cases.

* In Madras there are no Divisions, but the Districts are very large.

The Commissioner should fix the time and place for the meetings of the Courts and the persons of whom the Court should be composed, having regard to the state of business, and also arranging matters in such a manner that no one should be a member of a Court which was to try appeals from his own decisions. The jurisdiction of the Courts should be as follows:

1.—Civil Court.

Civil jurisdiction.

Appellate Jurisdiction.—From all inferior Courts from which an appeal lies in all cases which such Courts are competent to entertain.

The decision of the Court to be final, but they should have power in their discretion to state cases for the High Court.

Original Jurisdiction.—All cases of whatever amount above the competency of the inferior Courts.

An appeal to lie to the High Court in cases under half a lakh of rupees; to the Privy Council in cases over half a lakh, or with special leave from the High Court.

Power to state a case for the High Court.

2.—Criminal Jurisdiction.

Criminal.

Appellate Jurisdiction.—Appeals from convictions by Full-Power Magistrates: the judgment of the Court to be final.

Original Jurisdiction.—The jurisdiction of a Court of Session. The judgment of the Court to be final, but the Court should have power to state a case in their discretion for the High Court.

The High Courts should retain their present powers of revision, perhaps even in an extended shape; but they should be exercised in the discretion of the Court.

I would add a provision somewhat enlarging the civil original jurisdiction of the High Courts, who might be invested with such jurisdiction upon the application of the parties in cases valued at half a lakh of rupees or upwards, or upon special application. An appeal in such cases should lie to the Privy Council. And in all cases the High Courts should have power in their discretion to state cases for the Privy Council.

Lastly, I would throw open the appointment of Civil and Sessions Judge to Barristers actually practising in India, and to Pleaders of a certain standing. This would require the sanction of Parliament, and I

think that the step might and ought to be taken at once and independently of all other reforms. I cannot, without swelling this Minute to an intolerable length, go into the question which the mention of this measure suggests as to the position of the covenanted and uncovenanted service, and the relation of the principle of competition to that subject. I think it one of the most important of all Indian questions the immense development of the uncovenanted service has thrown the whole matter into confusion.

Moreover some scheme should be devised by which the Natives of different parts of the country should get a full share of the appointments given in their own countries. It seems to me that the Natives of the Presidency Towns, and in particular the Bengalees, have at present an unfair advantage in this respect.

Effect of this scheme.

The effect of this would be as follows:

The High Courts would be relieved of all special appeals, of all criminal appeals, and of all civil appeals except in cases of very large amount, which of course are few in number. On the other hand they would have an original civil jurisdiction, which they do not now possess, and would have a certain number of special cases referred to them; but there can be no doubt that the relief thus afforded would make it possible to reduce the number of the Judges very largely.

The Civil and Sessions Judges would remain as they are, but they would receive the assistance of Magistrates in criminal cases and of Civil Judges in civil cases.

Some additional duty would be thrown on the Magistrates and Civil Judges, but as it would be divided amongst a fair number of them, this addition would not be great, and the reductions in the High Courts would probably go far to pay for them.

The inferior Civil Judges in the same way would have some additional duty, and this might render it necessary to have some increase in their numbers. It is, however, pretty clear that, as time goes on, it will be necessary to increase this branch of the service.

It is needless to dwell upon the financial side of the question as the change would have to be introduced by degrees, so that any increase of expense which it might cause would be exceedingly gradual.

Advantages.

The advantages of the scheme in a judicial point of view would be these: It would do away with all double appeals, whilst it would give an appeal in all cases, except sessions cases, and in these the final decision would be subject to the powers of revision in the High Court, and would be delivered by Judges who actually saw and heard the witnesses after a preliminary inquiry before a Magistrate. It would in all cases enable the inferior Court to take the opinion of a superior Court on points of law.

By throwing open the position of Sessions and Civil Judge to Natives, and by providing division Courts in which business of importance would be transacted, a good deal would be done towards converting the

law in India into a regular profession, and towards providing prizes sufficient to reward the industry and, more or less, to guarantee the respectability of its practitioners.

Some persons may regret the existence of such a profession, but it already exists and will, beyond all question, increase both in numbers, importance, and influence, and it appears to me that the true policy on every account will be to encourage it, and to hold out to those who succeed in it the ordinary rewards of professional success.

Finally, the scheme could be introduced by degrees as opportunity offered, and could be carried out without any shock to existing interests, or any breach of continuity in the working of the present system. The Government of Bengal should be specially called upon to consider this matter and offer suggestions upon it, as the High Court of Calcutta is the Court in which the state of business is most unsatisfactory.

Panchayets,

One point of the first importance has been left so far unnoticed in this Minute. It is the question of the more frequent employment of the Native method of settling disputes by panchayets. The advantages of panchayets have been insisted on by many writers of eminence. Nothing, indeed, can be more attractive or plausible than the arguments which may be urged in their favor. The panchayet, it may be said, is popular; it represents local knowledge; it relieves European officers of work which they must perform very much in the dark. Witnesses will speak the truth before panchayets, who would tell lies in a British Court. It is very cheap, and it leaves in the people's hands the administration of their own affairs.

might, perhaps, have been made useful.

I think it very probable that, if this institution had been carefully observed and fostered from the beginning of our rule, if its working had been studied, and proper means taken for correcting its defects, and giving it as much regularity as it required, the results might have been good; but, as matters now stand, we must either alter the whole system of the administration of justice, or panchayets must occupy a very subordinate position, and their members, in cases of importance, must be mere voluntary arbitrators. The use of assessors in criminal cases, who are to act as advisers to the Judges of the Courts of Session, is the only vestige of the institution which has found its way into our system.

Difficulties of combining systems on opposite principles.

The truth is, that it is almost impossible in practice to make two systems, based upon totally different principles, work harmoniously side by side. Panchayets must occupy one of two positions,—they must either be Courts of Justice regulated by no law, which is both a practical and a theoretical impossibility, or they must be boards of arbitration whose awards are enforceable by law.

British Government must take the responsibility of administering justice.

Now as the law stands, if people are willing to submit their disputes to arbitration, there is nothing to prevent

them from so doing; and I am told that arbitration for this purpose is continually resorted to, especially by Native merchants. So frequently, indeed, is this the case that, in many Provinces, commercial questions between Native merchants of any standing seldom come before our Courts. Of the advantages of this there can, of course, be no question at all. I am also informed that the village panchayets in the Madras Presidency (who have a petty criminal jurisdiction) are exceedingly useful. It does not, however, follow from this that it would be safe to put any very large share of the administration of justice into the hands of these bodies.

Difficulties of panchayet system.

If a case is of real importance and excites real feeling, a panchayet is likely to be open to every sort of indirect influence, and, if its decision is to be enforced, a sense of injustice will be produced which will not be less keen, because the British Government makes itself the instrument of an unjust tribunal instead of pronouncing an unjust decree. If the decision is not enforced, it is worthless: disputes go undecided, and, after a certain time, we come to violence and blood-feuds like those which have been, and to a certain extent still are, so common in the wilder parts of the country. If we are to rule at all, we cannot avoid the responsibility of administering justice according to law, nor can this be evaded by the use of any particular legal machinery. That the Native administration of justice was and still is corrupt and ineffective in many ways, is proved by the very fact of our presence in the country. Merely to sanction this corruption and inefficiency by accepting Native decrees and carrying them out, would be a timid and futile attempt to avoid the responsibility of the position we have taken. Directly such decrees have to be examined and controlled, we get English law and English Courts.

Whether finality of award increases its value. Panjáb experience.

It is possible, however, that, in practice, the fact that there was such a control in the background might make the panchayet both more careful and more trustworthy; and, whenever the Code of Civil Procedure is re-enacted, I think that the question whether the sections relating to arbitration might not be modified, should be most carefully considered. Section 324 at present provides as follows: 'No award shall be liable to be set aside, except on the ground of corruption or misconduct of the arbitrator or umpire; any application to set aside an award shall be made within ten days after the same has been submitted to the Court.' This provision was, no doubt, meant to give vigour and finality to the proceedings before the panchayet, and it reproduces the law of England on the subject. I am told that, in the Panjáb, where there used to be an appeal from the decision of the panchayet to the District Officer, the result has been directly the opposite of this. When the parties knew that there was an appeal from the decision of the panchayet, they would refer matters to it, and would, in almost every case, be satisfied with its award; but, now that its decision is final, the practice of referring matters to arbitration at all has greatly diminished.

Panchayets in criminal cases.

In criminal cases I do not think that panchayets could be of much use, unless their jurisdiction was very narrowly limited. They would in substance be no more than assessors, and assessors are already provided for by the Code of Criminal Procedure.

These observations, however, relate only to the general principles of the subject. The state of things may differ in different parts of the country, and upon this point I think local inquiries would be most important.

Corruption of subordinate Native officials.

A further remark, which is continually made, is that, though no one suspects European Judges of corruption, and though the suspicions as to Native Judges are exceptional, a good deal of corruption exists amongst the inferior Native officials of the Courts. Officers who have mixed much with the people, and in particular military officers who had nothing to do with judicial work, have often told me that Natives have represented this to them as a great evil. The complaint was strikingly and rather ludicrously embodied in the following statement which I have heard attributed to a Native gentleman. Speaking of a notoriously corrupt Judge, he is said to have remarked—"Blessed be God, that was a good and righteous Judge. His house was open to all, and he received gifts with his own blessed hand, and gave judgment accordingly; whereas, with the sahibs, we have to pay the chaprassis, and what judgment will be given God knoweth."

Subordinate officials probably corrupt under false pretences.

I have made many inquiries into this subject in relation to Court of Justice, and it appears to me probable that bribes are given, not in consideration of anything that the inferior officers can actually do, or in the expectation that they will do any definite thing, but in accordance with the inveterate habits of the country and under an impression that somehow or other the desired end will be obtained. To ignorant suitors the whole system of procedure is an utter mystery, and they are not aware of the fact that the routine of the procedure as to the entry and hearing of suits, and as to all particulars connected with them, is so arranged that it is impossible that any inferior official should exercise any influence, not only over the decision, but over the time at which a case is heard. Of course, a subordinate here or there may hint to suitors that he will watch his time and say a word to the Judge with whom he has influence, and they may be simple enough to believe and fee him accordingly for doing absolutely nothing. I do not see how this can be helped until, in the progress of time, the experience of the Native referred to above suggests the conclusion that it is waste to bribe people who are so unprincipled as to take the money and not deliver judgment accordingly. The only way in which the existing impression could be removed would be by convincing the Natives that they are mistaken in supposing that the subordinates can influence the Judge; but how to give them a knowledge of our system at once popular and sufficiently accurate for practical purposes, is a great problem.

I say nothing of subordinate executive officials. Obviously their opportunities for corruption are, out of all comparison, greater than is the case with judicial subordinates, for they have in some cases real powers of annoyance and extortion.

What expectations as to judicial reforms are reasonable.

In conclusion, I would offer some remarks on the subject of the sort of expectations which it is reasonable to form of the results of judicial reforms in India. I have already pointed out the difficulties under which justice is, and must be, administered. I must now add that great patience must be shown in waiting for such a mitigation of their effects as can be hoped for.

Magnitude of operations in India in proportion to means.

It seems almost trivial to refer to the enormous magnitude of the operations which the British Government has had to conduct in India, or to the extraordinary smallness of the means which have been at their disposal.

Knowledge of that subject in England and India.

Familiar, however, as these topics are, they are not sufficiently considered and realised either in England or in India. In England they are thought of only in the vaguest way, and with no adequate knowledge of the nature of the leading details. On the other hand the extreme familiarity of civilians in India with the practical working of that particular part of the system with which they are individually concerned, and their earnest zeal for the maintenance or the alteration of particular parts of it, produces some of the effects of ignorance. The Englishman is too far off to see at all. The Anglo-Indian looks at the subject through a microscope. On this account it may, perhaps, be not altogether out of place to make a few observations from an intermediate point of view.

Administration of justice under Native Governments.

Before the establishment of British power in India, the administration of justice was almost entirely a personal matter. Law, no doubt, there was in the imperfect shape of customs more or less venerated and complied with, and regarded in some cases as being of divine origin; but, in the application of these customs to particular cases, there was room for any conceivable amount of oppression, partiality, and corruption on the one hand, and on the other for deviations from the law in particular cases from more amiable motives; for it is often forgotten that oppression and compassion are correlative, and that justice has the tendency to exclude mercy as well as corruption. This system was totally inconsistent with the whole spirit of our rule, though the tradition of it appears to have survived, and still to survive to a certain extent.

Complaints of rigidity, &c., of our system.

The common complaint about our system is its harshness, its rigidity, its intricacy, its pedantry, and so forth. Words of this sort are used freely, and with little care or accuracy. I have done my best to attach a definite signification to them by ques-

tioning many of those who have made use of them. I have, in particular, pointed out to them that, within the last 12 or 14 years, the law of the country has been immensely simplified; that the 511 sections of the Penal Code represent 4,787 paragraphs of Beaufort's Digest (itself an abridgement); that the Codes of Civil and Criminal Procedure replace probably hundreds of intricate conflicting ill-understood Regulations and Acts which involved, amongst other things, a system of special pleading in civil cases not altogether unlike that of the English common law; and that, whereas Mr. Clarke's edition of the Regulations and Acts in force in Bengal in 1850 filled three thick 4to volumes, the surviving Regulations and Acts, after 20 years of active legislation, would go into something like two such volumes.

Our laws greatly simplified of late years.

Meaning of these complaints. Practice as to evidence.

To this I have received two, and only two, intelligible answers,—one is that, in old times, Magistrates could get through much more business than at present by having a number of mohurrirs engaged in taking evidence in a number of cases at once. This would account for the old system being less troublesome to the officers who worked it, but hardly for its being more satisfactory to the Natives. The other answer was that, formerly, the recollection of the rule of the Native powers was strong on the people, that they did not know what was meant by legal rights, that there were no lawyers amongst them, that they habitually did what they were told, and that, though there were Appellate Courts and a system of superintendence, the Courts administered the law less strictly than at present, and more in the spirit of the District Officers. Thus, though the laws administered are now far simpler than they formerly were, the amount of discretionary power left to the District Officers is practically less than it was. I have been told of particular acts of authority done by Magistrates under this system, which would not be possible in the present day. When I observed that their conduct, as the law then stood, was illegal, they replied that they knew that, but took their chance, and no one interfered with them.

Spirit of Native rule survived.

This state of things has passed.

Whether this state of things was good or bad it is useless to inquire; it is a state of things which was obviously temporary and inconsistent with the fundamental principles of our rule. It is hardly necessary to insist upon the principle that laws are intended to be obeyed, and that the officers of Government are intended to have so much discretion in their execution as the law gives them, and no more. I do not think that any one who studies the statute-law of India will say that the Government of India has habitually erred in giving their officers too little power, or that any one who looks at the history of the country will say that Government has erred on the side of not supporting any and every lawful exercise of that power.

The old state of things has been to a great extent put an end to since the Government of India was brought under the Crown. I do not at all mean to say that the two things were cause and effect, but they seem to have followed each other. The truth is, that many causes have co-operated to bring about this result. I will glance at a few of these. The first and most important by far was the close of a long series of wars and annexations which had absorbed the attention of the successive Governors General and their advisers almost without interruption from the time of Lord Auckland to the time of Lord Elgin. The Afghan war, the war under Lord Ellenborough in Central India, the two Sikh wars, the annexations of the Panjáb, Sattara, Nagpur, and Oudh, the mutiny and its suppression, followed each other so closely that the Government of India had little time for internal organic legislation.

Causes of its passing away.

Era of peace.

It is only during the unbroken peace which has marked the last eleven years that the Government has had time to legislate for the whole of India, or that India has formed a compact whole to be legislated for, or that the different parts of it have been brought near enough to each other by railways to enable the Government to treat it as one country. Moreover the traditionary disinclination of the Government of India to substitute law of its own making for Mahomedan and Hindu law was very powerful. The first and greatest of all Indian legislative enactments, the Penal Code, remained in the condition of a draft for nearly 24 years, and did not become law till some time after the death of its principal designer.

Besides this, many circumstances have contributed powerfully to the spread of a far better appreciation of the nature of the law, and a wider extension of the conception of legal rights than ever existed before. Amongst others I may mention the substitution of the competition system for the old system of nomination. The effect of this is, that the District Officers are much better educated than their predecessors, particularly in law, and, as the law which they have to learn is infinitely simpler and easier than the old law, they naturally learn it better. Again, the education of the Natives, especially their education in all that relates to law and Government, has made astonishing progress since 1857, in which year the Universities of Calcutta, Madras, and Bombay were founded by Acts passed on the eve, or in the very height, of the mutiny.* Nearly everything that can be asserted about Indian affairs is disputed, but I have never met any one who denied that the difference between Native Pleaders and Judges regularly educated and their predecessors, who had received no education at all, is hardly capable of exaggeration. These things and others which need not be mentioned, have introduced into India a very different

Competition system.

Native education.

* II. of 1857 the University of Calcutta Act was passed, 24th January 1857.
XXII. of 1857 the Bombay University Act was passed, 18th July 1857.
XXVII. of 1857 the Madras University Act was passed, 5th September 1857.

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